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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

ILLINOIS STATE LABOR RELATIONS BOARD, ILLINOIS DEPARTMENT OF CENTRAL MANAGEMENT SERVICES, AND ILLINOIS DEPARTMENT OF CORRECTIONS,

Petitioners,

v.

ILLINOIS NURSES ASSOCIATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST JUDICIAL DISTRICT

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QUESTION PRESENTED

Where a State contracts with a private company to provide services on behalf of the State, and the private company controls the wages, hours, and working conditions of its employees who perform the contracted-for services, does the National Labor Relations Act pre-empt a State labor relations board from assuming jurisdiction over a charge of unfair labor practices brought on behalf of these employees?

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In The

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ILLINOIS STATE LABOR RELATIONS BOARD, ILLINOIS DEPARTMENT OF CENTRAL MANAGEMENT SERVICES, AND ILLINOIS DEPARTMENT OF CORRECTIONS,

Petitioners,

v.

ILLINOIS NURSES ASSOCIATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST JUDICIAL DISTRICT

The Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Illinois Appellate Court, First Judicial District, entered on March 30, 1990.

OPINIONS BELOW

The July 19, 1990, order of the Illinois Supreme Court denying Petitioners' motion to reconsider the denial of their petition for appeal as of right or, in the alternative,

for leave to appeal from the March 30, 1990, opinion of the Illinois Appellate Court, First Judicial District, is not published, but is reprinted in the appendix hereto at p. App. 1.

The June 1, 1990, order of the Illinois Supreme Court denying Petitioners' petition for appeal as of right or, in the alternative, for leave to appeal from the March 30, 1990, opinion of the Illinois Appellate Court, First Judicial District, is not published, but is reprinted in the appendix hereto at p. App. 2.

The March 30, 1990, opinion of the Illinois Appellate Court, First Judicial District, is reported *sub nom. Illinois Nurses Ass'n v. Illinois State Labor Relations Board, et al.*, at 196 Ill. App. 3d 576, 554 N.E.2d 404 (1st Dist. 1990), and reprinted in the appendix hereto at p. App. 3.

The July 20, 1988, administrative decision of the Illinois State Labor Relations Board is reported *sub nom. Illinois Departments of Central Management Services and Corrections*, at 4 Public Employee Reporter for Illinois ("PERI") ¶ 2034 (ISLRB 1988) and is reprinted in the appendix hereto at p. App. 13.

The June 5, 1987, opinion of the Illinois Appellate Court, First Judicial District, is reported *sub nom. Illinois Nurses Ass'n v. State Labor Relations Board, et al.*, at 156 Ill. App. 3d 841, 509 N.E.2d 1307 (1st Dist. 1987), and reprinted in the appendix hereto at p. App. 65.

The October 24, 1985, administrative decision of the Illinois State Labor Relations Board is reported *sub nom. Illinois Departments of Central Management Services and*

Corrections, at 1 PERI ¶ 2028 (ISLRB 1985) and is reprinted in the appendix hereto at p. App. 69.

JURISDICTION

The judgment of the Illinois Appellate Court, First Judicial District, was entered on March 30, 1990. (p. App. 3) The court reversed and remanded a decision of the Illinois State Labor Relations Board ("ISLRB"), which dismissed, for want of jurisdiction, an unfair labor practice charge filed by the Illinois Nurses Association ("INA") against the Illinois Department of Central Management Services ("CMS") and the Illinois Department of Corrections ("DOC").[1] (p. App. 12) On June 1, 1990, the Illinois Supreme Court denied Petitioners' timely petition for appeal as of right or, in the alternative, for leave to appeal from the appellate court's judgment. (p. App. 2) On July 19, 1990, the Illinois Supreme Court denied Petitioners' motion to reconsider the denial of the petition for appeal as of right or, in the alternative, for leave to appeal. (p. App. 1) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

[1] The appellate court remanded the case to the ISLRB for purposes of determining, under State law, the merits of the unfair labor practice charge filed by INA. (p. App. 12) The remand does not affect the finality of the appellate court's holding that the ISLRB must assume jurisdiction over the charge. It does not, accordingly, affect the finality of the federal pre-emption issue here presented.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause of the United States Constitution, U.S. Const., art. VI, cl. 2.

Sections 2(2), 7 and 8 of the National Labor Relations Act, 29 U.S.C. §§ 152(2), 157, 158.

Sections 3(f) and (o), 5(a) and 7 of the Illinois Public Labor Relations Act, Ill. Rev. Stat. ch. 48, ¶¶ 1603(f) and (o), 1605(a), 1607 (1989).

The above constitutional provision and statutes are reproduced in the appendix beginning at p. App. 81.

STATEMENT OF THE CASE

INA is a party to a collective bargaining agreement ("agreement") with CMS. CMS is the State agency responsible for administering personnel services on behalf of the State of Illinois. (R. C230)[2] The agreement between INA and CMS recognizes INA as the exclusive bargaining representative of professional registered nurses employed by the State of Illinois. (R. C254, C259)

DOC is the State agency responsible for operating correctional institutions in the State, including the Shawnee Correctional Center ("Shawnee"). (R. C698; Jt. Ex. 1). DOC's responsibilities include the provision of proper

[2] Because the transcript of the administrative hearing is paginated separately from other documents in the record on appeal, the record on appeal contains duplicate numbering. The designation "R." refers to the first 86 pages of the record. The designation "R. C" refers to the remainder of the record.

health care and treatment for inmates incarcerated in State correctional institutions. Ill. Rev. Stat. ch. 38 ¶ 1003-2-1 *et seq.* (1989).

Correctional Medical Systems, Inc. ("Systems") is a for-profit corporation based in St. Louis, Missouri, and licensed to do business in Illinois. Systems is a wholly-owned subsidiary of ARA Services, Inc. ("ARA"). ARA is a privately held, diversified company in the health care, children's day care, food service, vending, and related businesses, employing over 100,000 people worldwide, with gross revenues exceeding $4 billion in 1986. (R. C267, C302-05, C855-58) Systems is in the business of contracting with correctional institutions to provide health care services to inmates. (R. C240) At the time of these proceedings, Systems was under contract in 16 states to provide health care services to the residents of 52 correctional institutions. (R. C305) Systems employs over 1,000 people nationwide. (R. C275, C302-05, C859-61) It began furnishing health care services to DOC in 1979. (R. C268) Among the institutions covered by Systems' contracts were Shawnee and eight other Illinois correctional facilities. (R. C383)

On June 24, 1985, INA filed an unfair labor practice charge with the ISLRB, alleging that CMS and DOC had violated the Illinois Public Labor Relations Act ("IPLRA") by refusing to bargain with INA over the wages and working conditions of registered nurses employed by Systems and working at Shawnee. (R. 3, C83) The ISLRB dismissed the charge, finding that the Shawnee nurses were employed by Systems, a private employer, who was outside the jurisdiction of the ISLRB. *Illinois Departments*

of Central Management Services and Corrections, 1 PERI ¶ 2028 (ISLRB 1985). (R. 5, 35) (p. App. 69)

INA appealed the ISLRB's decision to the Illinois Appellate Court. (R. 86) On June 5, 1987, the court remanded the case to the ISLRB with directions to conduct further evidentiary proceedings with respect to the determination of its jurisdiction. *Illinois Nurses Ass'n v. State Labor Relations Board*, 156 Ill. App. 3d 841, 509 N.E.2d 1307 (1st Dist. 1987). (R. 75) (p. App. 68) The court specifically directed the ISLRB to evaluate INA's contention that Systems' employees were also employees of the State, that Systems was acting as an agent of DOC, and that DOC maintained control of the terms and conditions of employment as to Systems' employees. 156 Ill. App. 3d at 843. (R. 75) (p. App. 67-68)

Pursuant to the order of the appellate court, the Executive Director of the ISLRB issued a complaint for hearing and, subsequently, an amended complaint. (R. 83, 84 ¶¶ 7-9) The State filed an answer denying the ISLRB's jurisdiction (R. 87), and Systems sought and was granted leave to intervene. (R. 100-03). The case was heard on September 8 and 9, 1987.

On the basis of the evidence adduced at the hearing, the ISLRB, on July 20, 1988, again concluded that it lacked jurisdiction over the matter and dismissed INA's charge. *Illinois Departments of Central Management Services and Corrections*, 4 PERI ¶ 2034 (ISLRB 1988). (p. App. 23) The ISLRB held that the State lacked sufficient control over the wages, hours and working conditions of the nurses at Shawnee to be deemed an employer of the nurses. (p. App. 22) It further concluded that Systems was not the

agent of the State with respect to the employment of the nurses at Shawnee because Systems exercised virtually exclusive control over the primary terms and conditions of the nurses' employment. (p. App. 23) Systems alone controlled the core group of bargainable subjects. (p. App. 21) Systems alone interviewed, hired, promoted and terminated the nurses employed at Shawnee and it alone controlled their wages and benefits. (p. App. 21)

INA appealed to the Illinois Appellate Court. On March 30, 1990, the appellate court reversed the ISLRB. *Illinois Nurses Ass'n v. Illinois State Labor Relations Board,* 196 Ill. App. 3d 576, 554 N.E.2d 404 (1st Dist. 1990). (p. App. 3) Although the appellate court correctly held that the ISLRB's findings as to the "fact of control are supported by the manifest weight of the evidence and, thus, this Court cannot reverse those findings," (p. App. 10), the Court went on to conclude that the State and not Systems employed the nurses at Shawnee. (p. App. 11) In reaching its conclusion, the Court did not analyze or even address a single federal labor law decision. (p. App. 11) Instead, the Court concluded that because the State is statutorily and constitutionally required to provide medical care to prisoners, the private employees of a private company that contracts with the State to provide such care on its behalf are actually public employees subject to the jurisdiction of the ISLRB. (p. App. 10) The court again remanded this case to the ISLRB, this time with directions to determine the substance of INA's unfair labor practice charge. (p. App. 12)

On April 23, 1990, Petitioners and Systems filed timely petitions for appeal as a matter of right or, in the alternative, for leave to appeal to the Illinois Supreme

Court. (Ill. Sup. Ct. Nos. 70131, 70132) Petitioners and Systems argued that the ISLRB was federally pre-empted from exercising jurisdiction as ordered by the appellate court. (p. App. 72, 77) The Illinois Supreme Court denied both petitions on June 1, 1990. (See p. App. 2, order denying petition in No. 70131)

On June 22, 1990, the ISLRB petitioned the National Labor Relations Board ("NLRB") for an advisory opinion as to whether the NLRB would assert jurisdiction over the parties to the proceeding here in issue. *State of Illinois, Departments of Central Management Services and Corrections,* NLRB Case No. AO-278. That petition remains pending.

Thereafter, Petitioners and Systems moved the Illinois Supreme Court to reconsider their petitions for appeal as a matter of right or, in the alternative, for leave to appeal. Petitioners also moved the Illinois Supreme Court to stay its mandate pending pursuit of review in this Court. The Illinois Supreme Court denied the motions to reconsider the petitions on July 19, 1990. (p. App. 1) The Court did, however, grant Petitioners' motion to stay its mandate pending application to this Court for a writ of certiorari. (p. App. 1)

REASONS FOR GRANTING THE WRIT

I.

The Appellate Court's Decision Directing The ISLRB To Assume Jurisdiction Over A Charge Of Unfair Labor Practice That Involves The Employees Of A Private Company Conflicts With Decisions Of This Court, The United States Courts Of Appeals, And The NLRB.

The National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*, vests the NLRB with jurisdiction over labor relations matters, including charges of unfair labor practices, concerning private employers and their employees. The NLRB's jurisdiction is exclusive. Under the Supremacy Clause, U.S. Const. art. VI, cl. 2, States must defer to the exclusive competence of the NLRB "[w]hen an activity is arguably subject to § 7 or § 8 of the [NLRA]." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959) (*"Garmon"*).[3] "If there is pre-emption under *Garmon*, then state jurisdiction is extinguished." *International Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 391 (1986). *Accord Construction Laborers v. Curry*, 371 U.S. 542, 548 (1963).

Section 8(a) of the NLRA regulates unfair labor practices committed by private employers. 29 U.S.C. § 158(a). (p. App. 84) Section 2(2) of the NLRA, which defines the employers over whom the NLRB has statutory jurisdiction, excludes from the definition of employer "any State or political subdivision thereof." 29 U.S.C. § 152(2). (p.

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[3] Section 7 of the NLRA, 29 U.S.C. § 157, confers the right of union organization (p. App. 83), while section 8, 29 U.S.C. § 158, protects employees against unfair labor practices. (p. App. 84)

App. 82) Systems has never claimed that it is the "State or a political subdivision thereof" within the meaning of section 2(2).[4] Therefore, it is clear that the NLRB has statutory jurisdiction over Systems and the nurses it employs.

Not only is it clear that the NLRB has statutory jurisdiction over Systems and its nurses, it is also clear that the NLRB could and would exercise that jurisdiction.

The NLRB cannot exercise jurisdiction in a narrow class of cases where a private employer and a governmental entity function as joint employers – where "governmental control 'extends to the minutest details of job performance and other terms and conditions of employment.' " *Staff Builders Services, Inc. v. NLRB*, 879 F.2d 1484, 1486 (7th Cir. 1989), *quoting NLRB v. Chicago Youth Centers*, 616 F.2d 1028, 1029 (7th Cir. 1979). To preclude the exercise of jurisdiction, the public entity "must exercise such substantial control over [the private employer] as to preclude meaningful collective bargaining." *NLRB v. Parents & Friends of Specialized Living Center*, 879 F.2d 1442, 1450 (7th Cir. 1989).

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[4] To the contrary, Systems filed a Response to the Petition for Advisory Opinion filed with the NLRB wherein it "urge[d] the NLRB to issue an advisory opinion finding that the NLRB would assert jurisdiction over the nurses at Shawnee as the employees of Systems, and finding that the nurses are not the employees of DOC." Response to Petition for Advisory Opinion at ¶ 6, filed by Correctional Medical Systems, Inc., in *State of Illinois, Departments of Central Management Services and Corrections*, NLRB Case No. AO-278.

In another class of cases, the NLRB has statutory jurisdiction but may, in its discretion, decline to exercise it. In these cases, the private employer does not retain enough control over the employment relationship to bargain effectively. In deciding whether to exercise jurisdiction in these cases, the NLRB " 'does not require that an employer control all terms and conditions of employment, but only that he retain enough control to bargain effectively.' " *Jefferson County Community Center v. NLRB*, 732 F.2d 122, 126-127 (10th Cir.), *cert. denied*, 469 U.S. 1086 (1984), *quoting Denver Post of Nat. Soc. v. NLRB*, 732 F.2d 769, 775 (10th Cir. 1984). Under this standard, the NLRB has exercised its jurisdiction even where the private employer is "subject to a multitude of government imposed restrictions and regulations," including "budget ceilings and restraints, review and oversight of . . . programs, . . . staff certification and licensing requirements, mandatory job classifications, program content and eligibility restrictions and physical plant specifications." *Id. Accord NLRB v. Parents & Friends of Specialized Living Center*, 879 F.2d at 1451-1453; *Staff Builders Services, Inc. v. NLRB*, 879 F.2d at 1486-1487.

The determinative issue in this class of cases is whether the employer has the "final say on the entire package of employee *compensation, i.e., wages and fringe benefits.*" *Res-Care, Inc.*, 280 NLRB 670, 674 (1986) (emphasis added). The NLRB has made clear that if a private employer maintains control over this "core group of 'basic bargaining subjects,' " then meaningful bargaining is possible and it will exercise its jurisdiction. *Id.* Indeed, so long as the private employer controls wages and fringe benefits, the NLRB will exercise its jurisdiction

even where a governmental entity requires (1) orientation, (2) state licensing, (3) pre-employment security investigations, (4) compliance with security rules, and (5) compliance with a dress code, and even where the governmental entity (1) sets work shift hours, (2) monitors contract performance, and (3) requires termination for breach of rules. *See Koba Associates, Inc.*, 289 NLRB No. 33 (1988); *Old Dominion Security, Inc.*, 289 NLRB No. 18 (1988); *Dynaelectron Corp., Aerospace Operations Div.*, 286 NLRB 302 (1987); *Long Stretch Youth Home, Inc.*, 280 NLRB 678 (1986).

Under these controlling federal precedents, the NLRB has, and would exercise, jurisdiction over the labor relations matter here in issue. The ISLRB determined that Systems exercised virtually exclusive control over the terms and conditions of the nurses' employment at Shawnee. (p. App. 21) The ISLRB found that Systems alone controlled the nurses' wages, benefits, hiring, promotion, discipline, and termination. (p. App. 21) The appellate court upheld these findings, stating that the ISLRB's findings as to the "fact of control are supported by the manifest weight of the evidence and, thus, this Court cannot reverse those findings." (p. App. 10) This is not, therefore, either a joint employer case or a case where the government controls wages and benefits to such an extent that meaningful bargaining between the private employer and its employees is not possible. Since, the labor relations matter here in issue is subject to regulation by the NLRB under section 8(a) of the NLRA, *Garmon*, 359 U.S. at 245, the ISLRB is federally pre-empted from exercising

jurisdiction over the merits of that dispute and the appellate court's decision that the ISLRB has jurisdiction must be reversed.

The ISLRB is so certain that the NLRB could and would exercise jurisdiction over this matter that it has asked the NLRB to issue an advisory opinion to that effect. *State of Illinois, Departments of Central Management Services and Corrections,* NLRB Case No. AO-278. The ISLRB took this extraordinary action because it is gravely concerned that the appellate court's decision requiring it to assume jurisdiction over this matter runs afoul of the Supremacy Clause. The ISLRB is fully cognizant of its role in the federal-state labor relations scheme and does not wish to contribute to the erosion of national labor policy.

The appellate court's reliance upon the state law doctrine of "non-delegability" in holding that the ISLRB has jurisdiction to determine the merits of the instant dispute is misplaced. (p. App. 10) Even assuming, *arguendo,* that State law confers jurisdiction on the ISLRB (which it does not), the ISLRB would still be federally pre-empted from exercising jurisdiction over this dispute. "[T]he point is not whether *state* law gives the state courts jurisdiction over particular controversies but whether jurisdiction provided by state law is itself pre-empted by *federal* law vesting exclusive jurisdiction over that controversy in another body." *International Longshoremen's Ass'n, AFL-CIO v. Davis,* 476 U.S. at 387-388 (emphasis in original). Here, the appellate court failed even to address the controlling federal precedents that were cited to it.

As governmental bodies increasingly contract with private entities for the performance of services, the jurisdictional issue presented in this case will increasingly arise. Definitive resolution of this issue is necessary to guide state courts and state labor relations boards and to avoid undue state interference with national labor policy. Therefore, Petitioners respectfully pray that a writ of certiorari issue to the Illinois Appellate Court, First Judicial District, so that this Court may review the merits of that court's conclusion that the ISLRB has jurisdiction over the Respondent's unfair labor practice charge.

II.

The Illinois Supreme Court's Refusal To Decide The Issue Of *Garmon* Pre-emption Raised By Petitioners Is In Conflict With The Decision Of This Court In *International Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 378 (1986).

This Court has mandated that "when a claim of *Garmon* pre-emption is raised, it must be considered and resolved by the state court." *International Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. at 393. A party advancing a claim of *Garmon* pre-emption "is entitled to an adjudication of its pre-emption claim on the merits." *Id.*

In this case, the March 30, 1990 decision of the Illinois Appellate Court, First Judicial District, raised a question of pre-emption under *Garmon* for the first time. The Appellate Court directed the ISLRB to assume jurisdiction over a labor relations matter involving the employees of a private, for-profit corporation that contracts with the State of Illinois to provide health care services to certain prisoners. Pursuant to Illinois Supreme

Court Rule 317, Petitioners sought to appeal the appellate court's decision to the Illinois Supreme Court as a matter of right, arguing that the ISLRB is federally pre-empted from exercising jurisdiction over the matter.[5] (p. App. 72) The Illinois Supreme Court refused to entertain the appeal. (p. App. 1, 2)

The Illinois Supreme Court's refusal to decide Petitioners' pre-emption claim clearly conflicts with the mandate of this Court in *International Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. at 393. Therefore, should this Court decline to issue a writ to the Appellate Court of Illinois, First Judicial District, Petitioners respectfully request that this Court treat the Supreme Court's refusal to consider the federal issue (pursuant to Petitioners' petition for appeal as of right) as a final judgment, *Burns v. State of Ohio*, 360 U.S. 252 (1959), and issue a writ of certiorari to the Illinois Supreme Court, directing it to determine the federal pre-emption issue submitted to it.

---

[5] Illinois Supreme Court Rule 317 provides, in pertinent part:

> Appeals from the Appellate Court shall lie to the Supreme Court as a matter of right in cases in which a question under the Constitution of the United States or of this State arises for the first time in and as a result of the action of the Appellate Court.
>
> * * *

Ill. Rev. Stat. ch. 110A, ¶ 317 (1989).

Like Petitioners, Systems also unsuccessfully sought to appeal the appellate court's decision to the Illinois Supreme Court as a matter of right on the ground that the NLRA pre-empted the exercise of State jurisdiction. (p. App. 77)

CONCLUSION

For these reasons, this petition for certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioners

Counsel of Record

August 30, 1990

No. 70131

IN THE

SUPREME COURT OF ILLINOIS

Illinois Nurses Association, etc., et al.,	)	Appeal
	)	Appellate Court
	)	First District
Respondents	)	1-88-2514
v.	)	S-CA-100
	)	
Illinois State Labor Relations Board, etc., et al.,	)	(Filed
	)	July 19, 1990)
Petitioners	)	

ORDER

IT IS ORDERED that the motion for leave to file a motion for reconsideration of the order denying leave to appeal is *denied*.

IT IS FURTHER ORDERED that the motion to stay the mandate of this Court in the above cause is *allowed* and the mandate is stayed pending the filing of a notice of appeal or an application for *certiorari* or the expiration of the period within which said application or notice may be filed. If *certiorari* is applied for or notice of appeal filed, the mandate of this Court shall, upon proof of such filing being made by affidavit filed with the clerk of this Court, be further stayed pending resolution by the United States Supreme Court of such application or appeal. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which appeal or *certiorari* may be sought.

70131

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

June 1, 1990

Hon. Neil F. Hartigan
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100 W. Randolph St., 12th Flr.
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No. 70131 – Illinois Nurses Association, etc., et al., respondents, v. Illinois State Labor Relations Board, etc., et al., petitioners. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for appeal as a matter of right or leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 25, 1990.

ILLINOIS NURSES ASSOCIATION, Petitioner-Appellant, v. ILLINOIS STATE LABOR RELATIONS BOARD *et al.*, Respondents-Appellee (Correctional Medical Systems, Inc., Intervenor-Appellee).

First District (5th Division) No. 1-88-2514

Reversed and remanded.

Opinion filed March 30, 1990.

JUSTICE MURRAY delivered the opinion of the court:

This is an appeal by plaintiff, Illinois Nurses Association (INA), from a decision of defendant, Illinois State Labor Relations Board (Board), which refused to take jurisdiction of an unfair labor practice charge made by the INA. Additional defendants include the State of Illinois, its Department of Central Management Services, Department of Corrections (DOC). Correctional Medical Systems (Systems) intervened for the limited purpose of contesting the Board's jurisdiction. Jurisdiction to hear this cause on direct appeal from the Board is provided by the Illinois Public Labor Relations Act (Act) (Ill. Rev. Stat. 1985, ch. 48, par. 1611). Even though the case involves nurses at downstate Shawnee Correction Center, near Vienna, the Act authorizes an appeal to the appellate court of a judicial district in which the appellant resides or transacts business. Ill. Rev. Stat. 1985, ch. 48, par. 1611(e).

This is the second time this case has been before this court. In *Illinois Nurses Association v. The State Labor Relations Board* (1987), 156 Ill. App. 3d 841, in which Systems was not a party, the Board dismissed INA's unfair labor practice charges for lack of jurisdiction. This court

vacated the Board's dismissal order and remanded the matter for further evidentiary proceedings pertaining to the determination of the Board's jurisdiction. Upon remand, an evidentiary hearing was held in September 1987. The hearing officer's recommended order issued in April 1988. He concluded that, although the State and Systems were joint employers, Systems was not a public employer within the meaning of section 3(o) of the Act. Section 3(o) defines "public employer" as including the State of Illinois and its political subdivisions, units of local governments or school districts, agencies of these entities, "and any person acting within the scope of his or her authority, express or implied, on behalf of such entities in dealing with its employees." (Ill. Rev. Stat. 1985, ch. 48, par. 1603(o).) The term "person" includes associations and corporations. Ill. Rev. Stat. 1985, ch. 48, par. 1603(1).

The hearing officer determined that the Board lacked jurisdiction because Systems was not an agent of the State and, thus, could not be a public employer. INA excepted to the finding of no agency, and Systems excepted to the joint employer finding. The Board, based on its own findings of fact, held that since DOC did not exercise any meaningful control over any significant aspects of the nurses' employment, it was not a joint employer with Systems. The Board also held that, pursuant to the Act, a private employer was subject to the Board's jurisdiction only if it was acting as an agent of a public employer and concluded that Systems, as the sole employer, could only be an agent if the nurses were State employees, which they were not. Accordingly, the Board upheld the hearing

officer's dismissal of INA's unfair labor practice charge because of a lack of jurisdiction.

It is undisputed that INA is the exclusive bargaining representative for nurses employed by the State, including nurses employed by the State to work at its correctional centers. In 1985, DOC entered into a non-bid contract with Systems, a private corporation licensed to do business in Illinois and based in St. Louis, Missouri. Systems, described in the contract as an independent contractor, has contracts to provide health services to correctional facilities in 16 States, including contracts with nine Illinois correctional facilities. Between April 1985 and June 1986, Systems was compensated on a cost-plus plan and provided all health care staff at Shawnee except for the Health Care Unit Administrator, who was a DOC employee. (Since July 1987, this position has been staffed by a Systems employee.) Included among Systems' staff are doctors, nurses, a dentist, psychiatrist and psychologist, a pharmacist, technicians, and clerical staff. Since July 1986, the contracts have provided that Systems is to be compensated on the basis of the number of inmates at Shawnee. Quarterly performance level adjustments may be made, as determined by DOC and Systems and approved by the warden, if there are any deficiencies in the agreed-upon staffing level. All health equipment costing over $100 is owned by the State.

Systems' staff is required to represent DOC with local groups. Systems solicits, interviews, and hires the nurses. DOC has the right to approve the "initial and continued employment" of nurses and sets the minimum qualifications for them, *e.g.*, Illinois license, one-year experience, CPR certification with correctional nursing experience

preferred. The contract also states certain details that the interviewer should focus on when questioning job applicants. Prior to starting work, each person hired by Systems must pass a DOC background check (for security purposes). The final hiring selection is subject to DOC's approval. (The Board found that DOC did not exercise this right but rather limited its involvement to overseeing security and professional licensing matters.)

The contract also gives DOC complete discretion to remove a nurse from Shawnee, although only Systems can terminate a staff member. If Systems does not remove the nurse from Shawnee at DOC's request, DOC can lock her out. In one case, Systems terminated a nurse after DOC conducted an investigation which resulted in the assistant warden requesting her termination. Nurses' personnel files must be kept at Shawnee; Systems keeps duplicate files in its St. Louis office.

DOC sets the minimum staffing and scheduling requirements, and specifies how many hours a week a nurse may work, approves all hours that have been worked, and the length of the meal period. DOC provides the meals on site (for security reasons). Requests for all absences and overtime must be processed according to DOC requirements and procedures. DOC requires that all nurses must be evaluated annually in accordance with applicable State rules. Although, in fact, Systems conducts the evaluations, DOC must verify them. DOC must approve all hours worked, which must be kept on DOC time-keeping forms. DOC requires all nurses to wear white uniforms and its identification badges which identify them as contractual employees. New nurses must attend 40 hours of orientation given by DOC at the State

of Illinois Training Academy in Springfield. Further, each year DOC requires all nurses to complete 40 hours of in-service training.

The contract states that nurses must comply with Administrative Regulations and Administrative Directives, as well as policies and procedures of DOC and Shawnee. The directives for the health care unit were written by the DOC Medical Director and approved by the Director of Corrections. From these directives, each institution develops its own institutional directives; at Shawnee, these were mostly written by a DOC employee and approved by the warden. Pursuant to these directives, the contract provides for a "Health Care Services Review Committee," which is made up of both DOC and Systems administrators. Its function is to review inmate complaints, infirmary care, mental health responses, health records, etc. Meeting minutes are given to the warden. The Shawnee nurses manual "is the how-to guide for organizing, planning and administering" health care, and incorporates applicable directives in addition to other details as to how the work is to be performed. The manual was written by a Systems employee, but after DOC's approval, became the property of DOC.

Nurses are hired as Systems employees. Systems determines their pay rate and issues the checks from St. Louis. It provides all benefits, *e.g.*, health insurance, retirement plan. Vacation time, sick leave, etc., are established by Systems. Only Systems can transfer, promote, discipline, and terminate a nurse. Systems pays unemployment and workers' compensation insurance premiums and all required employee taxes. However, the

contract provides that systems has a right to "seek representation and indemnification from the Attorney General's Office."

●1 The findings of facts by the hearing officer and the Board were similar for the most part, although the hearing officer's findings were considerably more comprehensive. However, the differences between the two opinions lie in the application of law to these facts. The question of subject matter jurisdiction is not a factual question but a legal issue. (*Schalz v. McHenry County Sheriff's Department* (1986), 113 Ill. 2d 198.) Jurisdiction of an administrative agency is determined by provisions of the statute creating the agency and conferring powers on it. (*Bio-Medical Laboratories, Inc. v. Trainor* (1977), 68 Ill. 2d 540.) After examining the relevant statutes and applying the law to the facts of this case, we conclude that Systems is an agent of DOC.

The standard used by the Board to determine employer status was established in *Du Page County Board*, 1 Pub. Employee Rep. (Ill.) par. 2003, Nos. S-RC-9, S-RC-17 (ISLRB April 26, 1985). In cases involving several potential employers, the crucial inquiry is the extent to which the entity is necessary to create an effective bargaining agent (degree of control test). The Board determined that DOC exerted little control over the nurses and thus was not a necessary party to any bargaining agreement. As a result, the Board concluded that the nurses could not be State employees.

However, we believe the initial task is to define the employer before applying the degree of control test. The Act defines a public employer as, among other things,

any person with authority to *act on behalf of the State or its departments*. (Ill. Rev. Stat. 1985, ch. 48, par. 1603(o).) And, "person" includes corporations. (Ill. Rev. Stat. 1985, ch. 48, par. 1603(1).) The Unified Code of Corrections sets forth DOC's duties. (Ill. Rev. Stat. 1985, ch. 38, par. 1001-1-1 *et seq.*) DOC is required to provide medical and dental care to the inmates. (Ill. Rev. Stat. 1985, ch. 38, par. 1003-7-2(d).) Moreover, the chief administrative officer *shall* administer DOC programs for the custody and *treatment* of inmates. (Ill. Rev. Stat. 1985, ch. 38, par. 1003-6-2(a).) DOC shall train its own personnel. (Ill. Rev. Stat. 1985, ch. 38, par. 1003-2-7.) The comments to the section which delineates DOC's duties note that DOC is given broad discretion in determining standards and procedures and rules for day-to-day operations. Ill. Ann. Stat., ch. 38, par. 1003-2-7, Council Commentary, at 136 (Smith-Hurd 1982).

●2 Thus, it is apparent that a State has an affirmative duty to provide persons in its custody with a medical care system that meets minimum standards of adequacy. (See *Wellman v. Faulkner* (7th Cir. 1983), 715 F.2d 269.) It has further been held that a public body may not delegate a discretionary public responsibility with which it is charged. (*Peters v. Health & Hospitals Governing Comm'n* (1981), 88 Ill. 2d 316.) Our Federal district court in *Henderson v. Harris* (N.D. Ill. 1987), 672 F. Supp. 1054, considered the claims of a Stateville inmate who allegedly received substandard medical care while waiting in the Federal Metropolitan Correctional Center in Chicago to testify in a Federal case. The *Henderson* court rejected the argument of the United States that the court lacked jurisdiction to hear plaintiff's complaint against the United States

because of the alleged negligence of a private corporation which had contracted as an independent contractor with the government to provide health services at the jail. Relying on *Estelle v. Gamble* (1976), 429 U.S. 97, 50 L. Ed. 2d 251, 97 S. Ct. 285, the *Henderson* court found that providing sufficient health care to inmates is a constitutional duty. The court stated, "[c]ontracting with private health services agencies will not relieve the federal government from its constitutional obligation. *The non-delegability of this duty applies to both state and federal governments.*" (Emphasis added.) *Henderson*, 672 F. Supp. at 1063.

●3 Without deciding the delegability issue, we must conclude that any corporation performing duties which are statutorily (and constitutionally) mandated as government duties must, at the very least, be acting on behalf of the State and is, thus, an agent of the State. Further, an agent may be an independent contractor. *Protective Insurance Co. v. Coleman* (1986), 144 Ill. App. 3d 682, 494 N.E.2d 1241.

●4, 5 Finally, in this case, both the hearing officer and Board used a "degree of control" test to determine the existence of the relationship between the State and Systems. The findings of both the hearing officer and Board as to the fact of control are supported by the manifest weight of the evidence and, thus, this court cannot reverse those findings. (*Wappella Education Association IEA-NEA v. Illinois Educational Labor Relations Board* (1988), 177 Ill. App. 3d 153, 531 N.E.2d 1371.) Although the facts do show control by Systems over the nurses at Shawnee, the right to control is by the agreement and law in the DOC, not Systems. The test of the agency is the

existence of the right to control or manner of accomplishing task by alleged agent as well as the agent's ability to subject principal to personal liability. To put it in another light, the relationship of principal and agent exists if the principal has the right or duty to supervise and control and to terminate the relationship at any time even though the right is not exercised. *Reith v. General Telephone Co.* (1974), 22 Ill. App. 3d 337, 317 N.E.2d 369.

Even though DOC permitted Systems to control the Shawnee nurses, the contract vested initial and continued employment of the Shawnee staff subject to the approval of DOC. The contract vested overall supervision in a medical director, and the director had to be approved by the agency's (DOC's) medical director's chief or his designee. Next, the contract provides for indemnification of Systems under the Illinois indemnification act (Ill. Rev. Stat. 1987, ch. 127, par. 1254). The term "employee" under that act includes individuals or organizations who contract with DOC for services. Ill. Rev. Stat. 1987, ch. 127, par. 1301.

Finally, Systems' contract is, by its terms, subject to termination if sufficient funds are not appropriated or otherwise made available to cover DOC's obligations.

●6 Based on the above, we conclude that as a matter of law and fact Systems, despite its control over the Shawnee nurses, is in fact a true agent of DOC in the rendering of medical service at the Shawnee Correctional Center and that the Board's conclusion that it is neither agent nor co-employer is in error.

Accordingly, we reverse the Board's decision and remand the case to the agency for a determination of the substance of INA's complaint.

Reversed and remanded.

COCCIA, P.J., and LORENZ, J., concur.

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ILLINOIS DEPARTMENTS OF CENTRAL MANAGEMENT SERVICES AND CORRECTIONS
Illinois State Labor Relations Board

Illinois Nurses Association, Charging Party and State of Illinois, Departments of Central Management Services and Corrections, Respondent and Correctional Medical Systems, Inc., Intervenor

Docket No. S-CA-100
July 20, 1988

Before Brogan, Chairman; and Manning and Hilliard, Board Members

DECISION AND ORDER OF THE ILLINOIS STATE LABOR RELATIONS BOARD

On March 31, 1988, Hearing Officer William E. Waechter issued a Recommended Decision and Order dismissing the unfair labor practice charge in the above-captioned matter. Thereafter, in accordance with Section 1220.60(a) of the Rules and Regulations of the Illinois Labor Relations Boards (Rules), 80 Ill. Admin. Code, Section 1200 *et seq.*, exceptions to the Hearing Officer's Recommendation were timely filed by the Illinois Nurses Association (INA or Charging Party) and Correctional Medical Systems, Inc. (Company). No responses were filed. The Illinois State Labor Relations Board (Board) heard oral arguments in this matter on June 20, 1988. After reviewing the record, exceptions, briefs and oral arguments, the Board modifies the Hearing Officer's findings of fact, as noted below, and agrees with his result, but for the reasons set forth below rather than those advanced by the Hearing Officer.

INA and the State of Illinois, Departments of Central Management Services and Corrections (State or Respondent) are parties to a collective bargaining agreement

(RC-6-OCB agreement) covering a State-wide unit of registered nurses. Respondent operates the Shawnee Correctional Center (Shawnee), a medium security prison located in Vienna, Illinois. INA contends that Respondent violated Section 10(a)(4) and 10(a)(1) of the Illinois Public Labor Relations Act (Act), Ill.Rev.Stat. 1987, ch. 48, pars. 1601 through 1627, by refusing to apply the terms of the RC-6-OCB agreement to certain nurses employed at Shawnee. The nurses are employed pursuant to a subcontracting arrangement with the Company, a for-profit corporation which is a wholly owned subsidiary of ARA Services, Inc., a diversified service company providing health care, day care, food service and vending services nationwide.

The threshold issue is the Board's jurisdiction to hear this matter.[1] Respondent and the Company contend that the nurses at Shawnee are not employed by a "public employer"[2] within the meaning of the Act and that, therefore, the Board is without jurisdiction. INA contends that Respondent and the Company are "joint employers" of the employees at issue and, further, that the Company is the "agent" of the Respondent. It therefore argues that the Board has jurisdiction pursuant to the statutory language which defines "public employer" to include "agents" of public entities.[3] The Hearing Officer found that Respondent and the Company each control the nurses' employment conditions and are, therefore, "joint employers." He concluded, however, that the Board did not have jurisdiction over this matter because one joint employer, the Company, is not a "public employer" and, therefore, is not covered by the Act. Since it is essential

that the Board have jurisdiction over both employers, he recommended that the charge be dismissed for lack of jurisdiction. He further concluded that there is no evidence that the Company acts as the State's agent in dealing with employees of the State and that, therefore, jurisdiction cannot be supported under an "agency" theory.

I. FACTS[4]

In 1984, the State opened Shawnee. Illinois law mandates that inmates incarcerated at State correctional facilities be provided with proper health care and treatment. See Ill.Rev.Stat. 1987, ch. 38, par. 1003-7-2(d). Following requests for proposals issued by the State, the Company submitted a bid and was awarded a contract to provide health care services to the inmates at Shawnee.

Under the contract between the State and the Company, the State pays a set amount each year for each inmate at Shawnee.[5] The Company provides all pharmaceuticals, supplies, hospitalization and outpatient services, and any equipment costing less than $100 per unit. Further, the Company furnishes and manages the entire medical staff.[6] The record reveals that the Company has sole and complete control over the wages and fringe benefits received by the nursing staff. Salary ranges are set by the Company for each job classification based on surveys that it alone conducts. Annual increases are also determined by the Company based on job performance evaluations performed by Company employees. The State has no authority to recommend or review wage rates set by the Company. Paychecks are issued by the Company

and it pays all unemployment and workers' compensation insurance, withholds income taxes and pays the employer's portion of social security tax. The Company provides the staff with medical, dental and life insurance, a retirement plan, vacations and funeral and sick leave. The State has no input in establishing these benefits.

Under the contract, the Company must provide health care services 24 hours a day, seven days a week and meet minimum staffing hours per week for each job classification. The Company may staff, and has staffed, beyond those levels. Actual shift schedules and daily work assignments are determined by the Company.

The record clearly shows that the Company alone recruits, interviews and hires the entire health care staff at Shawnee. The State has no control over who is hired by the Company, but the contract does impose minimum qualifications for some staff positions and the State reviews certain hiring decisions to assure compliance with those requirements.[7] In addition, the State runs a security clearance check on all individuals hired by the Company and retains the right to deny access to the facility to anyone who poses a security risk.

All probation, promotion, seniority, transfer, layoff and termination policies and procedures which govern the staff's employment are determined by the Company. Discipline and grievance procedures also are set solely by the Company.

The Company publishes and distributes its own personnel policy manual, which details compensation policies, job classifications, meal periods and timekeeping procedures. It also covers employee benefits, evaluations,

and disciplinary procedures. The State has no input or approval function in regard to the personnel manual.

The record shows that both the State and the Company have formal procedures in place for monitoring contract compliance and the quality of health care services provided at Shawnee. There is substantial evidence that the oversight procedures focus wholly on the *health care* that the inmates are receiving and do not extend to the terms and conditions of employment of the health care unit staff. The Administrative and Institutional Directives, and the security rules and regulations, issued by the State for the health care staff to follow, establish standard operating procedures for the provision of health care services and the maintenance of prison security. There is no evidence to suggest that these rules and regulations limit in any substantive way the Company's control over its labor relations policies.

II. DISCUSSION AND ANALYSIS

The Hearing Officer viewed this case in terms of the analysis established by us in *DuPage County Board*, 1 PERI ¶2003 (Ill. SLRB 1985), for determining "employer" status under the Act. We stated therein that where there is more than one potential employer, all parties with the authority over the employment situation necessary to maintain a stable and effective bargaining relationship must be named as employers and held responsible for their bargaining obligations under the Act. The relevant inquiry, we stated, is the "extent to which the entity is necessary to create an effective bargaining relationship." *DuPage County Board, supra.* Subsequently, we have used this

analysis many times to determine which of several potential employers possess the requisite authority to be named as a statutory "employer." See e.g., *City of East St. Louis (Public Library)*, 2 PERI ¶2006 (Ill. SLRB 1985); *County of Kane*, 2 PERI ¶2012 (Ill. SLRB 1986); *County of Cook and the Chief Judge of the Circuit Court of Cook County*, 4 PERI 2025, 4 PERI 3011 (Ill. SLRB and Ill. LLRB April 17, 1988); *County of Will, Chief Judge of the Twelfth Judicial Circuit and Public Defender of Will County*, 4 PERI 2028 (Ill. SLRB May 23, 1988).

The Hearing Officer relied upon several factors to determine that the State "shares control" with the Company over various terms and conditions of the nurses' employment, and concluded that they are "joint employers" of the nurses. We disagree with his finding of "joint employer" status. Over review of the record indicates that the State exercises meaningful control over no significant aspect of the nurses' employment.

The joint employer analysis utilized by the Hearing Officer[8] essentially incorporates the "degree of control" test[9] utilized by the National Labor Relations Board (NLRB) to determine when it can assert jurisdiction over a private employer with ties to a governmental entity under the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* (1985). In *Res-Care, Inc.*, 280 NLRB No. 78 (1986) and *Long Stretch Youth Home, Inc.*, 280 NLRB No. 79 (1986), the NLRB affirmed that the appropriate standard for determining when to assert jurisdiction over an employer with ties to an entity exempt from the coverage of the NLRA is whether the covered employer has sufficient control over the employment conditions of the employees involved to enable it to bargain effectively

with a labor organization, as required by the statute. See also *Community Interactions*, 288 NLRB No. 115 (May 18, 1988).

Our application of the NLRB standard requires that our determination of the issue presented herein be based upon an analysis of the degree of control exercised by the Company over the labor relations of the employees involved, as well as the control retained by the State. If the State lacks the ultimate authority to determine primary terms and conditions of employment[10] of the affected employees, it lacks the ability to engage in the necessary "give and take" which is an essential requirement of meaningful bargaining.

The facts in evidence are clear that the State has little control over the employees' terms and conditions of employment. With respect to hiring, the record demonstrates that the Company alone solicits, interviews, hires and provides orientation for new employees. The Hearing Officer found that the State also had "control" in this area, but the evidence shows that the State's involvement is limited to overseeing security and professional licensing matters. Only after the employees have been hired, and in some cases after they have begun working, does the State perform its security and licensing checks. Such State-imposed minimum qualification standards are insufficient to defeat the finding that sole hiring authority is vested in the Company. *Long Stretch Youth Home, Inc., supra; Trailways Commuter Transit, Inc.*, 284 NLRB No. 103 (1987).

The Hearing Officer also found that after hire, a nurse's continued employment is subject to the State's

approval. The record shows, however, that the Company alone decides which employees to discipline or discharge; the State's "control" is limited to denying access to those persons found to constitute a security breach. Such a lockout does not cause the employee's discharge; the Company is free to assign the employee elsewhere.[11] Similarly, we find unpersuasive the Hearing Officer's reliance upon the State's alleged authority to set the nurses' work schedules. The record shows that the contract between the Company and the State sets out minimum staffing levels per week for each job classification, which the Company is free to exceed. The contract also requires the Company to provide health care services 24 hours a day, seven days a week. Other than these minimal restrictions of the nurses' hours of work, the record shows that the Company alone controls the nurses' individual work schedules and work assignments. Minor limitations on work hours does not interfere with a collective bargaining relationship and does not indicate State "control." *Long Stretch Youth Home, Inc., supra.*

Finally, we disagree with the Hearing Officer's conclusion that because the nurses are required to attend 40 hours of in-service training and are subject to Administrative and Institutional Directives, and security rules and regulations, the State has "control" over bargainable aspects of their employment. The record shows that the in-service training is concerned primarily with security regulations and is required for all nurses who work in correctional facilities; it does not significantly affect their wages, hours or any other term or conditions of employment. The same is true for the Directives and rules and regulations, which primarily set out operating procedures

for the provision of health care services at Shawnee. We agree with the NLRB that such operational controls go to the issue of contract compliance, rather than control over the essential terms and conditions of employment. *Long Stretch Youth Home, Inc., supra.*

The facts clearly establish that the Company alone retains complete authority over wages and other economic terms and conditions of the nurses' employment. In addition, the Company has ultimate control over hiring, firing, promotions, transfers and discipline. The State's involvement in establishing certain minimum qualifications for the health care unit staff and in conducting contractual compliance checks in no way diminishes the Company's ultimate control over labor relations. The State' complete lack of authority over a single essential term or condition of the nurses' employment makes implausible any finding that the State is even a joint employer of the nurses at issue here.

Our application of the "degree of control" analysis makes it clear that we must decline to assert jurisdiction over the State as the employer of the Shawnee nurses. Although our application of the principles set forth in *Res-Care, supra,* and *Long Stretch Youth Home, Inc., supra,* to the facts in this record leads to the conclusion that assertion of jurisdiction over the State as the nurses' employer is improper, we must also, however, definitively resolve INA's additional contention[12] that we should assert jurisdiction over the Company as the "public employer" of the Shawnee nurses pursuant to the "agency" language in Section 3(o) of the Act.[13]

The Act provides that a private corporation may be considered a public employer subject to the Board's jurisdiction where it acts within the scope of its authority on behalf of the [State] in dealing with [State] employees. See fn. 2. As the foregoing analysis illustrates, the facts in this record clearly establish that the Shawnee nurses are not "[State] employees," as required by the Act, and the agency provision is thus inapplicable. Furthermore, there is no evidence in the record to establish that the Company acts on behalf of the State in dealing with the nurses.

The primary consideration in determining whether an entity is acting as an agent in Illinois is the nature and degree of control exercised over the work being performed.[14] *Dumas v. Lloyd*, 6 Ill. App. 3d 1026, 286 N.E. 2d 566 (Ill. App. 1st Dist. 1972). However, the Act contains a significant limitation of this agency law. It limits coverage of the Act to only those situations where the "agent" acts on behalf of the public entity in dealing with the "principal's" *employees*.[15] That is, an "agent" is considered to be a "public employer" under the Act if the alleged agent deals with individuals employed by a public entity. Thus, in order for the Company to be the State's agent, it is essential that the nurses be employees of the State.

Our examination of this record, however, has revealed that the nurses at Shawnee are employed by the Company, and not the State. Using the "degree of control" analysis, we have concluded that the Company, and not the State, controls every essential term and condition of the nurses' employment. Therefore, it follows that the Company is not the State's agent[16] because the Shawnee nurses are employees of the *Company*, and not the *State*.

Consequently, we may not assert jurisdiction over the Company based upon an "agency" theory.

In concluding, we comment upon the procedural posture in which this case was presented. INA, in negotiations for the RC-6-OCB agreement, gave the State the right to subcontract for nursing services such as those provided at Shawnee. Now, it seeks to simply apply the terms of the RC-6-OCB agreement to the employees of the subcontractor. Should the State comply, the subcontractor relationship would cease to exist; indeed, it is ludicrous to imagine that that contract could continue in effect with all State wages, benefits and other conditions of employment simply superimposed on it. The employees would in effect *become* those of the State. It is our not our function to recruit employees for the State or members for INA; it is simply, in these circumstances, to determine upon the facts presented whether the State controls the employment conditions of these employees to a sufficient degree for us to assert jurisdiction.[17] It does not, and the charge is dismissed.

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[1] The proceedings began on June 24, 1985, when INA filed an unfair labor practice charge against the State, alleging that it had violated Section 10(a)(4) of the Act by refusing to apply the terms of the RC-6-OCB agreement to the nurses at Shawnee. On August 27, 1985, the Board's then-Chief Administrator dismissed the charge. The charge alleged that the Company and the State were "joined employers" of the Shawnee nurses and, since the Board must have jurisdiction over both joint employers, she dismissed the charge because the Board lacked jurisdiction over the Company, a private corporation. The Board upheld the dismissal on October 24, 1985, for essentially the same reasons advanced by the Chief Administrator. On June 5, 1987, the Illinois Appellate Court for the First District

remanded the matter to the Board to determine whether the Board could assert jurisdiction over the Company as an "agent" of the State. *Illinois Nurses Association v. State Labor Relations Board*, 156 Ill. App. 841, 509 N.E.2d 1307 (Ill. App. 1st Dist. 1987), 3 PERI 4012. In accordance with the court's order, a Complaint for Hearing was issued on July 27, 1987, and the matter was set for hearing before Hearing Officer Waechter.

[2] Section 3(o) of the Act, in relevant part, defines "public employer" as:

> the State of Illinois; any political subdivision of the State . . . ; and any person acting within the scope of his or her authority, express or implied, on behalf of such entities in dealing with its employees.

[3] All parties to this proceeding agree that the Section 3(o) language defining a public employer to include "any person acting within the scope of his or her authority . . . on behalf of (the State and other public entities) in dealing with its employees" requires that, in this case, we must find that the Company acts as the State's agent in dealing with the *State's* employees before we can assert jurisdiction on this theory over the Company. Although, as discussed below, we agree with the Hearing Officer that the Company is not the State's agent, we note and correct an inconsistency in his findings on this point. He concludes that the State *is* a joint employer of the employees at issue, but nevertheless determines that the agency language cannot be invoked because the employees are not "State" employees. We disagree with this interpretation although we deny jurisdiction for other reasons.

[4] INA has excepted to certain of the Hearing Officer's factual findings. We have examined the record and find them without merit.

[5] Under the parties' first contract, effective March, 1985 until June 30, 1986, the State compensated the Company on a cost-plus, fixed-fee basis, under which the Company received a management fee and reimbursement for personnel expenses incurred by the Company. The State was required to furnish all medical supplies, equipment, fixtures and other health care items. On July 1, 1986, the parties signed a new contract, under which the State sold to the Company all of its existing supplies

and pharmaceuticals, and no longer became responsible for furnishing such items. The terms of the current contract are similar to those under the July 1, 1986 contract. Although neither party introduced a copy of the initial contract into evidence, it appears that the *only* difference in the contracts is the manner in which the Company is compensated by the State. Thus, the State's degree of control over the terms and conditions of the nurses' employment has never been altered despite changes in the contract with the Company.

[6] Under the July 1, 1986 contract, the Medical Director became an independent contractor of the Company and not of the State, as he had been under the 1985 contract. Furthermore, in July, 1987, the Health Care Unit Administrator became an employee of the Company rather than of the State. With these personnel changes, the Company became the employer of virtually all personnel connected with the Shawnee Health Care Unit.

[7] For example, the State requires that registered nurses working in correctional centers possess an Illinois' license, cardiopulmonary resuscitation training certification, and one year nursing experience.

[8] Some state labor relations agencies still rely upon the "joint employer" analysis to determine their jurisdiction in these situations. See *Lancaster Guidance Center*, 16 PERI ¶16025 (Pa. Hrg. Ex. Dec. 1984); *Orange – Seminole – Osceola Transportation Authority*, 9 FPER ¶ 14094 (FPERC 1984; *AFSCME, Council 7 v. Michigan Department of Health*, 78 Mich. App. 416, 97 LRRM 2299 (Mich. Ct. App. 1977); *Jackson County Public Hospital v. PERB*, 280 N.W.2d 426, 102 LRRM 2857 (Iowa S. Ct. 1979). In cases where all potential employers are subject to our jurisdiction, we shall continue to determine whether they are "joint employers" by analyzing the control exercised by each entity over significant employment terms. Where, as here, only one entity is a public employer within the meaning of Section 3(o) of the Act, we shall simply focus on the control retained by that entity to determine whether it can fulfill its bargaining obligations under the Act.

[9] The Board recently utilized a similar "right of control" test in determining "independent contractor" status. See *County of Will, Chief Judge of the Twelfth Judicial Circuit and Public Defender of Will County, supra.*

[10] Section 7 of the Act requires a public employer to, *inter alia*, "negotiate in good faith (with the public employees' representative) with respect to wages, hours and other terms and conditions of employment." It is these subjects of bargaining to which we must focus our inquiry to determine the authority of the parties to effectively bargain.

[11] As the Hearing Officer found, the Company may reassign an employee to work in another State with which it does business if the Respondent denies access to a Company employee based on a security check.

[12] We note our agreement with the Company that INA's "alternative" positions in this case are completely inconsistent. INA argues that Respondent and the Company are "joint employers" and that the Company is the "agent" of the Respondent. A "joint employer" finding is premised on a conclusion that *each* party controls certain of the primary terms and conditions of employment; an "agency" finding is premised on proof that *one* party has sole control and the other is simply carrying out its mandates.

[13] Essentially, this is what the Illinois Appellate Court for the First District ordered us to do.

[14] The factors to be weighed in determining whether a private employer is an agent of a public agency include (1) the extent of control which by agreement the public agency may exercise over the details of the work, (2) whether the private employer is engaged in a distinct occupation or business, (3) with respect to the occupation of the private employer, whether the work is usually done under the direction of the public agency or without supervision, (4) the skill required in the occupation, (5) the entity which supplies the instruments, tools and place of work, (6) the length of time for which the contractor is employed, (7) the method of payment, whether by the hour or by the job, (8) whether the work is part of the regular business of the public agency, (9) whether the parties believed they were creating a principal/agent or independent contractor relationship, and (10) whether the contractor is in business. See *Spivey v. Brown*, 150 Ill. App. 3d 139, 502 N.E. 2d 23 (Ill. App. 3rd Dist. 1986); *Restatement of Agency 2d*, ¶ 220.

[15] INA cites *Baker Bus Service v. Keith*, 416 A.2d 727 (Maine S. Ct. 1980) to support its agency theory. In that case, the court determined that the City's control over routes and hiring and the fact that the Bus Company was not required to furnish equipment were sufficient indicia of control to render the company an agent of the City. *Baker Bus* can be factually and legally distinguished from the present case. The language in Maine's Labor Relations Act is arguably broader, encompassing all government contractors, regardless of their involvement in labor relations matters, as long as they act for a government body in some capacity. Factually, unlike the present case, the City in *Baker Bus* retained veto power over the hiring of any bus driver, and the City was responsible for nearly all of the company's costs associated with the contract.

[16] This is not to say that other evidence might establish that the Company is the State's agent for other purposes *not* related to labor relations. For example, the contract provision relating to indemnification suggests that the parties anticipated the possibility of an agency relationship existing between them for purposes of civil liability exposure.

[17] We note that INA counsel was questioned during the oral arguments herein as to whether the State, alone, could effectively bargain for these employees, or whether the presence of the Company was also necessary at the bargaining table. Counsel initially replied that the ability to bargain "depended" upon our order. We stress that we must rule on the relationship as it is represented to us, not create one for the parties. See *County of Cook and the Chief Judge of the Circuit Court of Cook County*, 4 PERI 2025, 4 PERI 3011 (Ill. SLRB and Ill. LLRB April 27, 1988). INA counsel finally asserted that the State could, pursuant to the terms of its contract with the Company, bargain all of the terms and conditions of employment of these employees. We find this assertion to be simply illogical.

HEARING OFFICER'S RECOMMENDED OPINION AND ORDER

On June 27, 1985, the Illinois Nurses Association (INA or Charging Party) filed a charge pursuant to Section 11 of the Illinois Public Labor Relations Act (Act), Ill.Rev.Stat. 1985, ch. 48, pars. 1601 through 1627, and the Rules and Regulations of the Illinois Labor Relations Boards (Rules), 80 Ill. Admin. Code Section 1200 *et seq.*, alleging that the Respondents, Illinois Departments of Central Management Services and Corrections (Employer or Corrections) have engaged in unfair labor practices within the meaning of Section 10 of the Act. The charge was investigated pursuant to Section 11 of the Act and, on August 27, 1985, the Illinois State Labor Relations Board's (Board) Chief Administrator dismissed the charge finding that the Board lacked jurisdiction, because one of the alleged joint employers, Correctional Medical Systems, Incorporated (Company) is not a public employer. The Charging Party appealed the Chief Administrator's dismissal and on October 24, 1985, the Board upheld the dismissal, *Illinois Departments of Central Management Services and Corrections*, 1 PERI par. 2028 (Ill. SLRB 1985). The Charging Party subsequently filed an appeal with the Appellate Court of Illinois for the First District under the Administrative Review Law, Ill.Rev.Stat. 1985, ch. 110, par. 3-101 through 3-112, and pursuant to Section 11(e) of the Act. On June 5, 1987, the Appellate Court remanded the case to the Board with directions to conduct an evidentiary hearing concerning the issue of whether the Board has jurisdiction over the matter, *Illinois Nurses Association v. State Labor Relations Board*, 156 Ill.App. 3d 841 (1987).

Pursuant to the Appellate Court's order remanding this charge, on July 27, 1987, the Executive Director[1] issued a Complaint for Hearing alleging that the charge involved dispositive issues of law or fact regarding whether the Respondents had engaged in unfair labor practices. On August 11, 1987, the Executive Director issued a First Amended Complaint for Hearing.[2] On August 20, 1987, the Company filed a Motion to Intervene in this case, and the Motion was subsequently allowed. The case was heard on September 8 and 9, 1987, in Springfield, Illinois, at which time the Charging Party presented evidence in support of the allegations and all parties were given an opportunity to participate, to adduce relevant evidence, to examine witnesses, to argue orally, and to file written briefs. Briefs have been filed on behalf of all the parties and have been considered. After full consideration of the parties stipulations, arguments and briefs, and upon the entire record of this case, I make the following findings:

I. PRELIMINARY FINDINGS

1. The Complaint alleges, the parties stipulated, and I find that the State of Illinois, Department of Central Management Services is a "public employer" within the meaning of Section 3(o) of the Act.[3]

2. The Complaint alleges, Respondent admits, and I find that the Illinois Nurses Association is a "labor organization" within the meaning of Section 3(i) of the Act.[4]

3. The Complaint alleges, Respondents admit, and I find that, at all times material, Charging Party has been the exclusive representative of registered professional

nurse employees in the RC-23 bargaining unit working at State-owned facilities.[5]

II. ISSUES AND CONTENTIONS

The Charging Party alleges that the Company is an agent of the Respondents, and not an independent contractor, and that accordingly, the Company is a public employer within the meaning of Section 3(o) of the Act and is subject to the Board's jurisdiction. Because the Respondents have failed to apply the RC-23 collective bargaining agreement to the registered nurses working at the Shawnee Correctional Center, the Charging Party argues that Respondents have violated Section 10(a)(4) and 10(a)(1) of the Act.[6]

The Respondents argue that the Complaint should be dismissed because the Company is an independent contractor and is not an agent of Respondents. Because the Company is an independent contractor, it cannot be deemed to be a public employer so the Board does not have jurisdiction over the Company and, accordingly, there is no duty to bargain with the Charging Party regarding the registered nurses working at the Shawnee Correctional Center.

III. FINDINGS OF FACT

The Charging Party is the exclusive bargaining representative of professional registered nurses employed by the State of Illinois. The registered nurses are represented by the Charging Party as part of the RC-23 bargaining unit and work for various State departments, including

the Illinois Department of Corrections.[7] The registered nurses employed by Corrections and represented by the Charging Party, work at various Correctional facilities and are involved in providing health services to the inmates.

Corrections is responsible for the safety of the individuals incarcerated at its various correctional facilities throughout the state as well as those in the Shawnee Correctional Center (Shawnee). Pursuant to the Unified Code of Corrections, Ill.Rev.Stats [sic], 1985, ch. 38, pars. 1001-1-1 through 1003-15-2, Corrections is required to provide proper health care and treatment for the inmates incarcerated at its various facilities.

In December, 1984, Corrections opened Shawnee, a new correctional facility in southern Illinois, located near the town of Vienna, Illinois. In April 1985, Corrections entered into a contract with Correctional Medical Systems, Incorporated, to provide health services for the inmates at Shawnee. The Company is a private corporation, based in Saint Louis, Missouri, and is licensed to do business in Illinois. The specific nature of the Company's business is providing health services to incarcerated individuals. Currently, the Company has contracts in 16 states, including Illinois, and is providihg health services at approximately 52 separate correctional facilities. The Company has contracts with Corrections to provide health services at eight other correctional facilities in Illinois in addition to its contract for Shawnee.

Until June 30, 1986, the contracts between the Company and Corrections for Shawnee were essentially personal services contracts,[8] and the Company was

compensated on a "cost-plus" arrangement. Pursuant to the original cost-plus contracts, the Company provided all of the health-care staffing at Shawnee except for the Health Care Unit Administrator position, who was employed by Corrections. The health-care staff that the Company provided included a physician or Medical Director; physicians, including specialists; a director of nursing; a supervising nurse; registered nurses (nurses); licensed practical nurses; dentists; dental assistants; a dental hygienist; a psychiatrist; a psychologist; a pharmacy director; a pharmacy apprentice; a radiology technician; a medical records administrator; and a clerical staff. Corrections was responsible for providing all of the supplies, equipment, and various pharmaceuticals necessary for the inmates' care and treatment.

Since July 1, 1986, the parties' contracts have been comprehensive service agreements, and the Company is compensated on a capitative basis. That is, the Company is paid a specific cost for each inmate at the facility, and Corrections' total cost will fluctuate as the inmate population at Shawnee increases or decreases. Also, in addition to providing the staffing necessary for the inmates' health care, the Company is now responsible for providing all pharmaceuticals, hospitalization necessary for the inmates' care, out patient services, disposable medical supplies, and equipment costing less than $100 a unit. Any piece of equipment costing $100 or more a unit is purchased by Corrections, and the Company is required to receive permission prior to ordering any such piece of equipment. Also, at the time the contracts initially became a comprehensive service agreement, the Company paid Corrections between $42,000 and $46,000 to

purchase the existing inventory of disposable supplies and pharmaceuticals at Shawnee. In addition, since July 1, 1987, the Health Care Unit Administrator position is no longer staffed by a person employed by corrections, but rather by an individual employed by the Company.

The Health Care Unit Administrator at Shawnee from June, 1985, until May, 1987, was Patsy Dorsey, R.N. Before working at Shawnee, Dorsey worked as the Health Care Unit Administrator at the Vienna Correctional Center. When Dorsey started her duties at Shawnee, in June, 1985, the nursing staff had already been hired and were already working at Shawnee. The nurses working at Shawnee, at the time that Dorsey started her duties, were all hired by the Company's Regional Director, Wilbur Carter. Carter interviewed the individuals applying for the various nursing positions, set their initial wage rates, and established their work schedules.

When the nurses are hired to work at Shawnee, they are hired as the Company's employees and not as employees of Corrections.[9] The nurses are paid pursuant to the Company's pay schedule, and their pay checks are on Company checks issued out of St. Louis. The nurses receive the same benefit package that the Company provides its employees (health and dental plan, life insurance, and retirement plan), and their right to receive paid holidays and vacations, sick leave, and leaves of absence are governed by the Company's rules. Also, the nurses are subject to the Company's transfer, seniority, probation, promotion, discipline and termination policies, as well as its grievance, lay off, and evaluation procedures. In addition, the Company is responsible for paying unemployment and workers' compensation insurance for

the nurses and withholds their state and federal taxes and remits the monies to the appropriate federal and state agencies and pays the employer's portion for their social security tax. Last of all, the nurses are not subject to any of Corrections' regular personnel policies or practices unless a specific policy or requirement was stipulated to in the parties' contract.

The contract between Corrections and the Company contains various sections and subsections that specify certain terms and conditions of employment regarding the nurses working at Shawnee.

Section 6.12 of the parties' contract provides, *inter alia*, that subject to the approval of Corrections' Medical Director, the Company's staff would "assist in designing and implementing policies, procedures and protocol" for the Health Care Unit. The Section also provides that the Company's staff are required to complete performance evaluations for employees under their supervision, "in accordance with applicable state rules," as requested by the Warden.

The policies, procedures and protocol which, according to the parties' contract, the Company's staff was to assist in developing and implementing at Shawnee has become known as the Nursing Manual. The Nursing Manual has been described as outlining the "how to do it" for providing nursing care at Shawnee. The Nursing Manual at Shawnee was developed by the Nursing Director, Patricia Tweedy, R.N., with assistance from Dorsey. Tweedy used Corrections' applicable Administrative and Institutional Directories in preparing the various policies, procedures and protocols contained in the Manual.

Among the different subjects that the various policy-procedures contained in the Manual include are "disposal of surgical instruments, needles and syringes," "first aid kits," "infirmary care guideline," "medication procedures," "chronic clinics," "sick call" and "medical records." These policy-procedures conform substantially with requirements contained in the Administrative and Institutional Directories or the parties' contract.[10]

The contract requirement that the nurses are to be evaluated annually is a specification that conforms with an accreditation requirement of the American Correctional Association, an association that establishes minimum standards regarding the institutions. At Shawnee, the nurses are evaluated by their supervisor. However, the Company utilizes its own procedures for evaluating nurses even though the contract states that the evaluations are to be conducted "in accordance with applicable state rules." During the time that Dorsey was the Health Care Unit Administrator at Shawnee, Dorsey signed-off on the nurses' evaluations. Dorsey signed-off on the evaluations merely to acknowledge that she was aware that the evaluation had been completed and how the nurse was evaluated; Dorsey did not have the authority to change a nurse's evaluation, and her signing-off on the evaluations was routine.

Section 6.13 of the contract addresses the "personnel" requirements under the parties' agreement.[11] Briefly, the section specifies what requirements and experience the employees are expected to have; that all applicants are to visit Shawnee before they start working at the facility; that all employees are expected to "meet the minimum requirements" established by the Illinois Department of

Central Management Services[12] for comparable positions; that employees are required to comply, *inter alia*, with all of Corrections' Administrative Regulations and Administrative Directives as well as Corrections' and Shawnee's policies and procedures; that the personnel files for all employees were to be kept at the Health Care Unit at Shawnee; that initial and continued employment at Shawnee is subject to Corrections' approval; and that Corrections may compel the Company to remove any person working at Shawnee regardless of cause.

In the event that there is a vacancy for a nursing position, the Company will advertise the position and request that interested individuals contact it. The Company examines the applicant's references and whether the applicant has the necessary experience required under the contract. At Shawnee, applicants interview with the Director of Nursing, who recommends an applicant to the Regional Administrator. If the Regional Administrator approves the Director of Nursing's recommendation, the individual is hired to work at Shawnee, subject to the condition that he or she pass a background investigation. Once the decision to hire an individual is made, the Company provides the individual with a starting date and forwards a copy of his or her credentials to the Warden's office.

Every person working at any of Corrections' correctional facilities is investigated by Corrections concerning whether the person has been convicted of any crime or has engaged in any "unacceptable behavior." The investigation consists of checking Federal Bureau of Investigation and Illinois Bureau of Investigation report sheets to ascertain whether the individuals have been convicted of

any crime other than "minor" traffic violations. If the background investigation discloses that an individual has been convicted of a felony, Corrections' policy requires that the individual must receive written approval from the Director or Corrections before he or she is allowed to work inside of a correctional facility. If the background investigation results in corrections refusing to allow an individual to work at Shawnee, the individual's status as an employee of the Company is not affected.[13] It should be noted, however, that at the time of the hearing, none of the nurses working at Shawnee failed to pass their background investigation.[14]

Representatives of Corrections do not participate in the screening process or interviewing any of the applicants. However, during the time that Dorsey served as the Health Care Administrator, Dorsey, at the request of the Company's Regional Administrator, Wilbur Carter, talked with the applicants and reviewed their credentials in the event Carter might request her input about the individual at a later time. The reason Dorsey talked with the applicants was only to ensure that the applicant met Corrections' requirements for the position, which was foremost to ensure that the nurse possessed a valid Illinois license. Neither Dorsey nor the Warden's office interviewed the applicant to ascertain whether they had a good work record or to determine whether, in their judgment, the nurse would serve as a good employee. Also, it does not appear the [sic] either Dorsey or the Warden's office reviewed the applicant's references or inquired into whether the applicant complied with the contractual work experience requirement.[15]

Under Section 6.13(d) of the parties' contract, Corrections' retains the right to approve "[i]nitial and continued employment" of the Company's staff at Shawnee. The evidence shows that on only one occasion was the Company requested to either replace or terminate a nurse working at Shawnee. The incident involved Lucille Cogdill, a registered nurse working the 11:00 p.m. to 7:00 a.m. shift at Shawnee. During Cogdill's shift, there were discrepancies involving the pharmaceutical inventory and Cogdill was not able to explain the reason for the discrepancy. An investigation was conducted by Corrections' Internal Affairs Investigator at Shawnee, Lieutenant Joey Suits, regarding the discrepancy, and Suits concluded that Cogdill's actions were not "very professional" and that, based on the evidence, it was his opinion that Cogdill was taking the medication herself. Suits recommended that "disciplinary action may be necessary for Professional misconduct." Subsequently, Assistant Warden for Programs, Scott Obourn, who is responsible for the health care services at Shawnee, wrote a memorandum to the Warden, Larry W. Mizell, identifying Cogdill as employed by the Company, but stating that after reviewing Suits' investigatory report, he was required to request that "Cogdill be considered for termination of services" at Shawnee.

As a result of Corrections' investigation, the Company terminated Cogdill as an employee. After Cogdill's termination, Warden Mizell issued a "stop order"[16] banning Cogdill from entering the Shawnee facilities. It should be noted, however, that it is standard operating procedures for Shawnee, or any of Corrections' facilities, to issue a stop order banning a former employee from

entry regardless of the reason for the employee's termination. The Company's Regional Administrator did admit that if the Company had not terminated Cogdill, Warden Mizell could nevertheless have issued the stop order banning Cogdill from the Shawnee facility, thus preventing her from working as a registered nurse at Shawnee.[17]

The record does show that the Company, on at least two occasions, has been requested to ban individuals working at other Corrections' facilities. In one instance, Corrections' Medical Director, Dr. Ronald Shansky, M.D., asked Carter to terminate the Director of Nursing working at the Centralia correctional facility. Instead, Carter transferred the nurse to Shawnee as the Supervising Nurse. The other instance involved the Warden at the Pontiac Correctional Center, who asked that the Administrator for the facility be "fired"; he did not want the person in his facility any more. Instead, Carter assigned the individual to St. Louis, and later promoted him and assigned him to another facility with which the Company has a contract.

Section 6.13(g) specifically provides that the nurses must comply, *inter alia*, with Administrative Regulations, and Administrative Directives, as well as policies and procedures of Corrections and Shawnee. The Administrative Directives are written generally and apply to the people working throughout Corrections. The Administrative Directives for the Health Care Unit are written by Corrections' Medical Director, Ronald M. Shansky, M.D., and are approved by the Director of Corrections, Michael Lane. The various correctional institutions use and adopt the Administrative Directives when developing their own Institutional Directives. In other words, the Institutional

Directives incorporate the applicable Administrative Directives to meet the special needs and circumstances of the particular correctional institution – in this case, Shawnee. At Shawnee, most if not all of the Institutional Directives regarding the Health Care Unit were written by the former Health Care Unit Administrator, Dorsey, and were later approved by the Assistant Warden of Programs and the Warden. All of the nurses working at Shawnee are expected to follow both the applicable Administrative and Institution as Directives that have been promulgated. If a nurse fails to follow a Directive properly, the nurse risks potential discipline. Any discipline that might result if the nurse did not properly follow the applicable Directive would be administered by the Company and not by Corrections. However, as previously discussed, if a nurse failed to follow the Directives, the Warden could issue a stop order banning the individual from the facility.[18]

The contractual requirement that the nurses' personnel files be maintained at the Health Care Unit parallels an accreditation requirement of the American Correctional Association. The files maintained at Shawnee are kept in the Director of Nursing's office, and include a copy of the nurse's employment application, performance evaluations, a notation regarding any promotions or letters of appreciation the nurse might have received, as well as any discipline matters involving the nurse. The Company also maintains personnel files for the nurses at its corporate office in St. Louis which, in addition to the information in the files at Shawnee, also contains the financial data regarding the nurse's employment history. Once a nurse has been terminated at Shawnee, the nurses

file at Shawnee is mailed to St. Louis, where it is integrated with the file there.

Section 6.14 of the parties' contract contains requirements regarding employee training and orientation. The section provides that the nurses, as well as any other full-time health care employee working at Shawnee, are to receive 40 hours of in-service training annually. The topics, which are to be the subject of the in-service training programs, are selected through the "Quality Assurance Program."

Even though the contract states that the Company will provide the appropriate in-service education or training programs, the evidence on the record shows that these programs have been provided by Corrections, not the Company. The 40 hours of in-service training that the nurses are required to complete involves attending different programs that the Corrections' Medical Director and his staff develop for the health care professionals throughout the agency. Corrections' "Quality Assurance Program" identifies the particular subjects or problem areas that might need improvement, and Dr. Shansky and his staff prepare and oversee training programs in those areas. The nurses working at Shawnee, like the nurses employed by Corrections' at other facilities, are required to complete the in-service training courses selected by Corrections. The nurses do not have the option to choose alternative training courses that they might prefer to complete in order to satisfy the 40 hour in-service training requirement.

Section 6.15 of the contract addresses the subject of staffing and scheduling. Generally, this section requires

that the employees are to spend their working time "on-site" at Shawnee, it specifies how many hours per week a full time employee may work, as well as the length of the meal period for each full shift worked, and all employees are required to sign in and sign out pursuant to Corrections' procedures, utilizing its "official" time-keeping forms.

The requirement, under Section 6.15(c) of the contract, that the nurses are to comply with Corrections' sign-in and sign-out procedures utilizing official Corrections time-keeping forms accomplishes two purposes. First, and most importantly according to Warden Mizell, is the security precaution. By requiring individuals entering and leaving Shawnee to sign-in and sign-out, the Warden knows who is within the facility in the event there is an emergency and the institution can then account for everyone inside the facility. The second reason for requiring nurses to sign-in and sign-out is to monitor the Company's compliance with the contract. It should also be noted that, in addition to Corrections' forms for signing-in and signing-out, the Company provides its own forms that the nurses are also required to sign-in and sign-out on, and it is these forms that the Company uses to calculate how many hours the nurses worked and prepare their pay checks.

Section 7.1A states that registered nurses are to work 280 "on-site weekly hours" on "rotating shifts." The agreement that the registered nurses will work "rotating shifts" is interpreted by the parties to mean that the nurses will be scheduled around the clock. The Company decides whether the individual nurses will work part-time or full-time, and what the shift hours will be. The

three regular shifts that the nurses work at Shawnee (7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m., and 11:00 p.m. to 7:00 a.m.) were established by the Company's Regional Administrator, and the Director of Nursing assigns the nurses to their individual shifts. Corrections does not have any directive or regulation regarding what shift hours nurses must work at a Correctional facility or whether the shifts must be staffed with full-time or part-time nurses.[19]

Section 6.18 of the contract addresses the subject of security at Shawnee. The Section states that the Company and its employees are subject to, and are required to comply with, all of Corrections' and Shawnee's security regulations. If a person violates any of the applicable security regulations, that person would risk being refused access to Shawnee. In addition, Corrections is obligated to provide the same security arrangements for the Company's employees that it provides for its own employees.

In addition to the requirement that the nurses sign-in and sign-out, the nurses must comply with Corrections' requirements regarding the wearing of identification badges. All of the nurses are issued identification badges which has the individual's picture, a description of the individual's physical appearance, and is signed by Michael Lane, Corrections' Director. The badge also identifies the nurse as a contractual employee. Regular Corrections' employees wear similar identification badges except their badges identify them as employees of Corrections. Moreover, any person entering Shawnee, either as a visitor or on business, is required to wear some type of badge identifying them as a visitor.

Another security requirement at Shawnee is that no one is allowed to bring food into the facility past the main gate. Shawnee is located in a rural area and there is no easy or quick access to restaurants. Since the contract requires that the full-time nurses have only 30 minutes for lunch, and because the nurses are not allowed to bring food into the facility, Corrections provides the full-time nurses with a meal during their lunch break.

Section 6.36 requires that the Company and Corrections cooperate in developing and implementing *quality control* procedures at Shawnee regarding the health care provided to the inmates. Section 6.39 requires that the Company provide Corrections with various reports and data regarding the services the Company is providing at Shawnee; this information is utilized to monitor the parties' contract.

Pursuant to Administrative and Institutional Directive number 04.03.125, as provided for under Section 6.36(c)(3) of the contract, a Health Care Services Review Committee is in existence at Shawnee. The chairman of this Committee is the Medical Director at Shawnee. In addition, the Director of Nursing, Supervising Nurse, Medical Records Administrator, Pharmacy Director, Supervising Psychologist, Health Care Unit Administrator, the Company's Regional Administrator, Assistant Warden for Programs, and the Warden at Shawnee all participate as members of the Committee. The purpose of the Committee, as the name suggest, is to provide a quality review mechanism for the health services the inmates are receiving.

Although the Institutional Directive requires that the Health Care Services Review Committee meet only "every two months," the Committee meets monthly as required by the contract. According to the Directive, the Committee is required to review a minimum number of cases regarding health records, institutional out-patient services, outside referrals, and medication usage; in addition, the Committee is required to review all ("one hundred percent") of the available cases involving inmate complaints, infirmary care, mental health responses, and outside hospitalizations. The Committee is required to keep minutes of its meetings and copies of the minutes are distributed to the Warden, Assistant Warden for Programs, Corrections' Medical Director, and also retained on file at the Health Care Unit.

In reviewing the case, the Directive specifies what information, in particular, that the Committee is required to examine when reviewing the various subjects. If and when a problem is identified by the Committee regarding the nature and quality of the health services the inmates are receiving, the Committee will attempt to formulate a solution for correcting the particular problem. The Committee later reviews the problem to determine whether it adequately has been corrected or whether additional corrective steps might be necessary.

Dr. Shansky routinely reviews the minutes of all of the Committee's meetings. If necessary, Shansky makes comments about the meetings and the nature of the health services the inmates are receiving. For example, if the minutes reflect that the Quality Review Committee was concerned strictly with record keeping and was ignoring questions of substance or the quality of the

health services being provided the inmates, Shansky would advise the members of the procedures they should take to ensure that they were properly focusing on the quality of the care the inmates were receiving rather than being concerned only about whether certain record-keeping procedures were complete. Also, if necessary, Shanshy might comment about an individual medical case at Shawnee or inmate grievances regarding their health care. In addition, Corrections' Exhibit 2, a copy of the minutes of the Committee's September 23, 1986, meeting, shows that the members discussed the fact that Shansky wanted more "one on one contact with the inmates in teaching them about AIDS," and that the members decided to implement the suggestion by making AIDS training part of "the intake screening procedure."

Another separate Institutional Directive, number 04.03.125.20, addresses Monitoring Procedures for Medical Services. This Directive is less concerned with assuring the quality of the health care being provided the inmates at Shawnee but, instead, is intended to ensure that the Company is providing health care services consistent with the contractual requirements. Specifically, the Directive requires that the Health Care Unit Administrator is to submit to the Assistant Warden of Programs monthly reports documenting the services the Company has rendered pursuant to the contract.[20] In addition, the Directive requires the Business Office at Shawnee to verify the actual hours of service the Company provided under the Contract before approving payment to the Company. The Directive also requires the Warden to approve the purchase of all "non-consumable equipment," that such approval must be documented, and that

all such items that are purchased are to be tagged and made part of Shawnee's "property control."

Section 6.41 of the parties' contract addressed inmate grievances. The Section provides that grievances concerning the health care the inmates receive are to be referred to the Medical Director at Shawnee who is to take appropriate action consistent with Shawnee's grievance procedures.

As previously noted, the Health Care Services Review Committee is required to review all inmate grievances concerning the health care they receive at its monthly meetings. Also, two nurses, Regional Nursing Consultants, employed on Dr. Shansky's staff (Corrections' Medical Director) respond to inmate grievances. Although Charging Party did not offer any evidence regarding what the institutional grievance procedure is, Department of Corrections' Regulations, 20 Ill. Admin. Code Sections 504.800 through 504.870 provide a grievance procedure that is applicable to Shawnee.

A number of the sections and subsections specify the services the Company is to provide Corrections at Shawnee. For example, one subsection specifies that the medical records are to utilize the "problem-oriented" format, another section lists the types of health-education programs that the inmates are to have available, while another section states what a treatment plan is required to include. There are a number of contractual requirements, including the specifications regarding sick call procedures, infirmary care and hospitalization, specialty clinics, emergency care, and mental health services, that

are also the subject of Administrative and Institutional Directives, which the nurses are required to comply with.

Last of all, it should be noted that Section 11.0 of the parties' contract provides that the Company or its employees "may see[k] representation and indemnification from the Illinois Attorney General's office" under "the provisions of the Indemnification Act of the State of Illinois" in response to lawsuits as a result of the services the Company provides under the agreement.[21]

The Act to which Section 11.0(a) refers, appears to be Ill.Rev.Stat.1985, ch. 127, pars 1301, 1302, concerning the representation and indemnification of state employees. Paragraph 1301(b) of the statute defines "employee" to mean, *inter alia*, "individuals or organizations who contract with the Department of Corrections . . . to provide services . . . *but does not mean an independent contractor except as provided in this Section*" [emphasis added]. Also, paragraph 1302 provides that the Attorney General may appear and defend an employee unless the Attorney General determines that appearing and defending either would involve an actual or potential conflict of interest or involves, *inter alia*, " intentional, willful or wanton misconduct."[22]

Other sections of the contract require the Company to provide Corrections with information concerning its "cost containment efforts," and the Company is required to "track" specific cost items regarding in-patient hospitalization, out-patient referrals, and primary health care services (Section 6.17). Section 6.24 provides that "[a]ll dental care [at Shawnee] shall be provided in accordance with [Corrections'] directive on dental care A.D. 4.03.120

A-J." And, last of all, Section 6.37 of the contract provides that Medical Audit Committees are to be responsible for annually reviewing and approving all health care policies and procedures, and that any changes made during the year are to be incorporated formally into the policy and procedure manual "subject to approval of [Corrections]" and the Shawnee Medical Director.

The nurses working at Shawnee perform identical or substantially identical work to that of the nurses employed by Corrections at its facilities and represented by Charging Party. However, the RC-23 collective bargaining agreement has never been applied to the nurses working at Shawnee.

IV. DISCUSSION AND ANALYSIS

Section 3(o) of the Act, in relevant part, defines "public employer" to mean

> . . . the State of Illinois; any political subdivision of the State, unit of local government or school district; authorities including departments, division, bureaus, boards, commissions or other agencies of the foregoing entities; and *any person acting within the scope of his or her authority, express or implied, on behalf of such entities in dealing with its employees* . . . [emphasis added.]

However, Section 3(n) of the Act defines "public employee" to mean

> . . . *any individual employed by a public employer* including interns and residents at public hospitals, but excluding all of the following; elected officials; executive heads of a department; members of boards or commissions; employees of any agency, board or commission created by this

> statute; employees appointed to State positions of a temporary or emergency nature; all employees of school districts and higher education institutions; managerial employees; short-term employees; confidential employees; independent contractors . . . [emphasis added.]

The Company is a private corporation doing business in Illinois. Since 1985, the Company has had a contract with Corrections to provide health services to the inmates incarcerated at Shawnee. Although the contract characterizes the Company as an independent contractor, the Charging Party challenges that status contending, instead, that it is an agent of Corrections by virtue of the fact that Corrections' retains significant control over the manner that health services are provided at Shawnee. Accordingly, the Charging Party contends that the Company is a public employer within the meaning of Section 3(o) of the Act by virtue of the fact that the Company is Corrections' agent in dealing with the nurses working at Shawnee, and, therefore, the Board has jurisdiction over the Company as well as the nurses.

In Illinois, the test for determining whether a master-servant or employer-employee relationship exists is the right to control the employee, which includes the power to discharge him. *Gundich v. Emerson-Comstock Co.*, 21 Ill. 2d 117 (1974); *Rozran v. Durkin*, 381 Ill. 97 (1942). In addition, other indicia that evidences whether an employer-employee relationship exists include the right to hire the employee, the manner of directing the employee, and who is responsible for supervising the employee. *Lilly v. Cook County*, 60 Ill. App.3d 573 (1978); *Tansey v. Robinson*, 24 Ill. App.2d 227 (1960). The crucial question, therefore, is whether the nurses working at

Shawnee are employee of Corrections, not whether the Company is acting as an independent contractor or as Corrections' agent. Accordingly, I shall determine whether the Company or Corrections, or both, employs the nurses working at Shawnee. See *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964).

In *Boire*, the National Labor Relations Board (NLRB) found that Greyhound was a joint employer of the employees of Floors Company, which Greyhound had contracted with to do janitor work at several of its Florida bus terminals. Greyhound argued that it was not a joint employer because Floors was an independent contractor. The Supreme Court dismissed the significance of Greyhound's independent contractor argument, stating:

> Whether Greyhound, as the [NLRB] held, possessed sufficient control over the work of the employees to qualify as a joint employer with Floors is a question *which is unaffected by any possible determination as to Floors' status as an independent contractor, since Greyhound has never suggested that the employees themselves occupy an independent contractor status.* 376 U.S. 473, 481 [emphasis added.]

Although Respondents and the Intervenor strongly argue that the issue whether the Company and Corrections are joint employers is not properly before me, and that, additionally, the Charging Party has waived its theory that they were joint employers by failing to appeal that part of the Board's dismissal, I believe the issue must be addressed in order to decide whether the Board has jurisdiction over this matter, since the issue of jurisdiction is the basis of the remand.

In *DuPage County Board*, 1 PERI par. 2003 (Ill. SLRB 1985), the Board stated that a joint employer relationship exists where the presence of two or more employers is "necessary to maintain a stable and effective collective bargaining process." Whether two or more employers are necessary to effectuate collective bargaining depends on which entities control the essential terms of employment. These essential terms of employment consist of the various "negotiable" aspects of the employment relationship, including the authority to hire, promote, evaluate, discipline, discharge, establish work rules, and set fringe benefits. *DuPage County Board, supra; Rock Island County Board of Health*, 3 PERI par. 2001 (Ill. SLRB 1986). If more than one entity exercises control over these various factors, or if control is shared by more than one entity, there is a joint employer relationship, *State of Illinois (Department of Central Management Services and Rehabilitation Services)*, 2 PERI par. 2007 (Ill. SLRB 1985); *City of East St. Louis (Public Library)*, 2 PERI par. 2006 (Ill. SLRB 1985); *Town of Decatur*, 2 PERI par. 2024 (Ill. SLRB 1986); and *City of Rockford*, 2 PERI par. 2033 (Ill. SLRB 1986).

The Board's standard for deciding whether a joint employer relationship exists is not significantly different from that utilized by the NLRB to determine joint employer issues under the National Labor Relations Act, (NLRA) 29 U.S.C. Section 151 *et seq.* (1985). In *TLI, Inc.*, 271 NLRB 798 (1984), the NLRB stated that the appropriate standard for determining joint employer status was the standard recognized in *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982). There, the court held that where "it can be shown that [two or more employers]

share or co-determine *those matters governing essential terms and conditions of employment* – they constitute 'joint employers' within the meaning of the NLRA," 691 F.2d 1117, 1124 and cases cited therein. [Emphasis added.]

Here, the evidence shows that although the Company controls many of the essential terms and conditions of the nurses' employment, its control is not absolute. Rather, its control is either subordinate to or shared with Corrections, regarding various essential terms and conditions of the nurses' employment at Shawnee. Most important among these essential terms and conditions of the nurses' employment over which Corrections has retained control include the fact Corrections has the right to approve the selection of nurses hired to work at Shawnee (Section 6.13(a)); that the nurses' initial and continued employment at Shawnee is subject to Corrections' approval, and that Corrections may insist on a nurse's removal from Shawnee regardless of cause (Section 6.13(d)); the nurses working at Shawnee are required to meet the State's minimum requirements for their positions (Section 6.13(e)); the nurses working at Shawnee are required to comply with Corrections' and Shawnee's rules and regulations and all applicable Administrative and Institutional Directives, and are subject to discipline if they fail to do so (Section 6.13(g)); the nurses must comply with Corrections' and Shawnee's security regulations and procedures (Section 6.18(a)); the nurses are required to meet Corrections 40 hours in-service requirement; and that nurses working full-time shall work 37½ hours per week with an additional 30-minute meal period for each shift worked (Section 6.15(b)). In additions [sic] there are numerous sections in the contract that specify the exact

manner and means by which the nurses work at Shawnee will be accomplished. Under the Board's standards in *DuPage County Board, supra,* I find and conclude that there is a joint employer relationship existing at Shawnee regarding the nurses.

I note, specifically, that the various authorities cited in support of the position that the Company and Charging Party are not joint employers are not controlling and, in my judgment, are distinguishable.

Bonnie Brae Child Care Counselors Association, 5 NSPER par. 10231 (N.J. Unfair Practice Dir. Decision 1979), involved a refusal to issue a complaint because the charge failed to allege a *prima facie* violation of the New Jersey statute. Because Bonnie Brae is primarily funded by state funds, Bonnie Brae's employee's are required to meet minimum educational requirements. The State Division of Youth and Family Services' review of Bonnie Brae was limited to ascertaining whether Bonnie Brae's employees met the minimum educational requirements. Here, Corrections control over the nurses is *not* limited to ascertaining whether the nurses meet the license requirements.

Santa Rosa Hospital, 3 FPER par. 13095 (Fl.PERC 1982) held that regardless of the fact that two entities, the public hospital and a private, for profit, corporation both exercised control over the corporation's employees' terms and conditions of employment. The Florida Commission's holding that a "joint employer relationship" did *not* exist was based on the fact that it lacked jurisdiction over the private employer. The holding did not state that both the public and private employers did not jointly share

control over the terms and conditions of the employee's employment.

In *Niagara Frontier Transportation Authority*, 13 PERB par. 3003 (N.Y. PERB 1980), the Airport Authority contracted with a private corporation to provide security services at its airports. The NLRB's Regional Director, ruling on a petition involving the security officers at the airports, dismissed the petition after finding that both the Airport Authority and the private corporation were joint employers of the security officers. The New York Board found it unnecessary to address the joint employer issue because of its finding that the corporation was "an employer" of the security officers, and that, accordingly, the Board did not have jurisdiction over the security officers.[23]

In *Lancaster Guidance Center*, 16 PPER par. 16025 (Pa. Hearing Examiner's Decision 1984), the Pennsylvania Hearing Examiner found that the unit being sought was subject to the NLRB's jurisdiction. The petition was accordingly dismissed because the Pennsylvania statute expressly provides that the Pennsylvania Board is precluded from asserting jurisdiction over employers under the jurisdiction of the NLRA. Moreover, the Hearing Examiner found that the Guidance Center had *absolute control* over the employees' terms and conditions of employment – a conclusion that does not apply to the Company regarding the nurses working at Shawnee.

In addition, the right to control the essential terms and conditions of employment is very similar to the test the NLRB has adopted for determining whether it has jurisdiction over a private employer with close ties to a

governmental entity exempt under the NLRA, *National Transportation Service,* 240 NLRB 565 (1979); *Res-Care Inc.* 280 NLRB No. 78 (1986).

The NLRB will refuse to assert jurisdiction over those private employers providing service to exempt public employers unless the employer has retained sufficient control over the employment conditions of its employees to enable it to engage in effective and meaningful collective bargaining with a labor organization. *National Transportation Service, supra.* In applying this test, however, the NLRB will examine not only the control over essential terms and conditions of employment retained by the employee, but also the scope and degree of control exercised by the governmental entity over the employer's labor relations to determine whether the employer is capable of engaging in meaningful collective bargaining, *Res-Care, Inc., supra.*

The NLRB's right of control standard is, in essence, the same standard the Board used in *DuPage County Board.* Neither entity, Corrections nor the Company, is capable of engaging in effective and meaningful bargaining regarding the nurses' essential terms and conditions of employment without the joint employer also present at the bargaining table.

Specifically, Charging Party relies on *Baker Bus Service v. Keith,* 416 A.2d 727 (Me. 1980) as authority of its claim that the Company is a public employer within the meaning of Section 3(o) of the Act. In *Baker Bus Service,* the Maine Supreme Judicial Court upheld the finding by the Maine Labor Relations Board that a private corporation was a "public employer" within the meaning of

Maine's Municipal Employees Labor Relations Law, Title 26, Maine Rev. Stats, Section 961 *et seq*. The Maine Board found, and the courts agreed, that the bus service was an agent of the governmental entity acting on its behalf, and not an independent contractor. Because "agent" was included within the definition of "public employer" under the Maine statute, the bus service was found to be a public employer subject to the Maine Board's jurisdiction.

For the following reason, however, I find *Baker Bus* inapposite to the case before me.

There is one important difference involving the Maine statute's definition of public employer and Section 3(o) of the Act: The Maine statute defines "public employer" to mean:

> . . . any officer, board, commission, council, committee *or other persons or body acting on behalf of* any municipality or town or any subdivision thereof . . . [emphasis added].

As already noted, however, Section 3(o) of the Act defines "public employer" to mean, *inter alia*,

> . . . any person acting within the scope of his or her authority . . . on behalf of such [governmental] entities *in dealing with its employees* . . . [emphasis added.]

The express language of Section 3(o) limits the circumstances, where agents acting on behalf of governmental entities will be deemed to be public employers under the Act. Unless the agent is (a) acting within the scope of his or her authority and (b) in dealing with the governmental entities' employees, the agent is not a "public employer" under Section 3(o) of the Act. These

words of limitation are not part of the Maine statute's definition of public employer, and, accordingly, a person who is deemed a public employer under the Maine statute will not necessarily be deemed a public employer under Section 3(o) of the Act.

Because there is no evidence that the Company acted as Corrections' agent in dealing with Corrections employees, I find and conclude that the Company is not a public employer within the meaning of Section 3(o) of the Act.

Having decided that the nurse [sic] are employed by joint employers, both Corrections and the Company, I am required to dismiss the charge before me because the Board does not have jurisdiction over the Company, *Illinois Depts. of Central Management Services and Corrections*, 1 PERI par. 2028 (Ill. SLRB 1985).

V. CONCLUSIONS OF LAW

1. That Correctional Medical Systems, Incorporated is not a public employer within the meaning of Section 3(o) of the Act.

2. That the registered nurses working at the Shawnee Correctional Center are not public employees within the meaning of Section 3(n) of the Act.

3. That the Board does not have jurisdiction over this matter.

4. That Respondents, Illinois Departments of Central Management Services and Corrections, did not violate Section 10(a)(1), (2), or (4) of the Act.

VI. RECOMMENDED ORDER

I recommend that the unfair labor practice charge be dismissed in its entirety.

VII. EXCEPTIONS

Pursuant to Section 1220.60(a) of the Rules and Regulations of the Board, parties may file exceptions to the Hearing Officer's recommendation and briefs in support of those exceptions no later than 30 days after service of this recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 15 days after service of the exceptions and responses shall be filed with the Board's General Counsel, Jacalyn J. Zimmerman, 111 North Canal Street, Suite 940, Chicago, Illinois 60606-7255. If no exceptions have been filed within the 30 day period, the parties will be deemed to have waived their exceptions.

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[1] The Chief Administrator position was changed to that of Executive Director.

[2] Charging Party moved to amend the First Amended Complaint to allege that the registered nurses working at Shawnee Correctional Center are public employees under the Act. The amendment is allowed.

[3] Intervenor does not stipulate that the Board has jurisdiction over this matter because jurisdiction is one of the issues to be resolved by the hearing.

[4] Intervenor expressed no opinion concerning Charging Party's status as a labor organization because it had no knowledge of facts sufficient to formulate a position.

[5] Charging Party alleges, but Respondents deny, that Charging Party is the exclusive bargaining representative of the professional registered nurses working at the Shawnee Correctional Center.

[6] The Charging Party did not brief any of the allegations in the Complaint alleging that Respondents violated Section 10(a)(2) of the Act. The allegations that Respondents violated Section 10(a)(2) of the Act are therefore dismissed.

[7] The RC-23 bargaining unit is a statewide unit of registered nurses certified by the Office of Collective Bargaining pursuant to Executive Order No. 6 (1973).

[8] That is, the Company provided services only, and Corrections provided the facilities, equipment, medications and pharmaceuticals, and any other item required for the inmates' health care.

[9] Pursuant to the parties' contract, Section 6.1 states that the Company is "an independent contractor insofar as the performance of services" provided for in the agreement is concerned, and that the Company

> . . . *shall exercise full and complete authority over its employees:* shall comply with the Workmen's Compensation, Employer's Liability and other Federal, State, County, and Municipal laws, ordinances, rules and regulations required of an employer performing services as herein contemplated; and shall make all reports and remit all withholding or other deductions from the compensation paid its personnel as may be required by any Federal, State, County or Municipal law, ordinance, rule or regulation.

In addition, Section 6.9 of the parties contract provide that neither the company

> . . . nor any person employed by contractor to perform services under this agreement shall be deemed to be an agent or employee of the Illinois Department of Corrections. Further, neither contractor nor any employees of Contractor [Company] shall be entitled to participate in any retirement or pension plan, group insurance program, or other programs

designed to benefit employees of the State of Illinois, Department of Corrections.

[10] The Administrative and Institutional Directives are discussed in greater detail below.

[11] Section 6.13 of the contract, in relevant part, provides:

> a) Contractor [Company] shall recruit and interview only candidates who have provided documentation of past health care experience and letters of recommendation. Each candidate will be interviewed by contractor with special focus on technical expertise, emotional stability and motivation. The final selection shall be subject to approval by the Department of Corrections.
>
> d) Initial and continued employment of staff shall be subject to *approval of the Department of Corrections. CMS [Company] agrees that in the event IDOC, in its discretion, is dissatisfied with any of the individual physicians or personnel provided under this agreement, the IDOC may give notice to CMS of such fact. If IDOC requests that an individual be removed for cause, information and documentation relative to IDOC's dissatisfaction with the employee shall be shared with CMS to the extent permissible according to IDOC rules and directives and State and Federal law. If the problem cannot be resolved, CMS agrees to remove the individual about which dissatisfaction has been expressed by the IDOC. During the pendency of any disputes upon IDOC's request CMS shall supply a replacement for said employee. If IDOC does not provide CMS with a reason for requesting that an individual be removed, IDOC shall continue to compensate CMS for that position for 30 days from the date of the request.* In addition, IDOC shall reimburse CMS for any replacement during this 30 day period, at the actual rate. [Emphasis added.]
>
> e) All personnel provided shall *meet the minimum requirements established by the Illinois Department of Central Management Services for comparable positions.* [Emphasis added.]

> g) All personnel shall comply with all current and future state, federal and local laws and regulations, court orders, Administrative Regulations, administrative [sic] Directives, American Correctional Association standards and policies and procedures of the Illinois Department of Corrections and the Center [Shawnee].

[12] The Department of Central Management Services serves as the personnel department for State Government, and is responsible for administering the Personnel Code, Ill. Rev. Stats. 1985, ch 127, pars 63b101 through 63b118.

[13] The failure to pass Corrections' background investigation does not necessarily terminate the person's employment with the Company. The company could either transfer the person to St. Louis to work at its corporate offices or, if possible, to a facility in another state with which it does business.

[14] At the time Shawnee opened, the background investigations were completed after the individual started work. Presently, the procedure is that the individual is not allowed to start working at Shawnee until after the background investigation has been completed. The record is not clear when this procedure changed.

[15] Dorsey resigned as the Health Care Unit administrator in May, 1987. Since July 1, 1987, the Health Care Unit Administrator is a person hired by the Company. There is no evidence that any nurses have been hired after Dorsey's resignation, and what the review procedure is at Shawnee since Dorsey's resignation, if indeed there continues to be one.

[16] The "stop order" is an order issued to the guards at the facility's gatehouse containing the person's name and picture, and stating that the person is no longer allowed entrance into the facility.

[17] If possible, the Company will transfer the individual to another facility with which it does business, if the person is "mobile," there is an available position, and the stop order does not apply to the other institution.

[18] Section 6.13(d) of the contract, quoted above, provides that Corrections may, with or without cause, require that the Company remove an individual working at Shawnee.

[19] It should be noted, however, that Carter's authority to set the shift hours appears to have been subject to Corrections' approval under Section 7.1A of the parties' contract, which provides that registered nurses are to work a minimum 280 hours weekly on rotating shifts (around the clock). The Section further provides that "all on-site hours must be approved by [Shawnee] and [Corrections]."

[20] The Directive requires that the Health Care Unit Administrator's report "shall include, but not be limited to," documentation regarding (a) whether the Health Care Services Review Committee's required reviews were completed in accordance with the applicable Directives, (b) whether employee performance evaluations were completed "as per contract requirements," (c) whether all new employees hired by the Company meet the minimum requirement under the parties' contract and any applicable Directives, (d) whether the Company's employees sign-in and -out on the proper forms, and (e) whether all time off (sickness, vacations) as well as any overtime or compensatory ("comp") time is approved by the Health Care Unit Administrator and processed pursuant to Corrections' applicable procedures and Directives. In addition, the Directive requires that the Business Office at Shawnee is to maintain copies of time sheets involving the Company's employees and "reconcile" the actual hours of service provided with the contract invoice. If there are no discrepancies, the Business Office is required to process a voucher for the purpose of paying the Company. If, however, discrepancies are found, the Business Office is required to contact the Health Care Administrator to verify whether the Company in fact provided adequate services as required by the contract. If the discrepancies are confirmed, the Business Office is required to notify the Warden of that fact.

[21] Section 11.0 of the contract, in relevant part provides:

> a) In the event that any civil proceeding is commenced against the Contractor or any physician contracted through the Contractor to provide services

> under this agreement, alleging death or bodily injury or other injury to the person of the complainant, resulting from or arising out of any act or omission in connection with services provided under this agreement, said defendants may see [sic] representation and indemnification from the Attorney General's Office under the provisions of the Indemnification Act of the State of Illinois.
>
> b) CMS will indemnify and hold harmless IDOC from and against all loss or costs arising out of CMS' gross negligence, criminal negligence or willful or wanton or intentional misconduct or disregard of proper or lawful written instructions from the Director of IDOC.

[22] Where the Attorney General refuses to appear and defend an employee due to a potential or actual conflict of interest, paragraph 1302 provides that "the State employee may employ his own attorney to appear and defend the action, in which event the State shall pay the employee's court costs, litigation expenses and attorneys' fees to the extent approved by the Attorney General as reasonable. . . . "

[23] Although the New York Board found it unnecessary to decide whether the Airport Authority was a joint employer, it stated that it would not have jurisdiction over the security officers even if the Airport Authority was a joint employer with the private corporation. "The jurisdiction of the [New York] Board extends to 'a joint public employer of public employees,' but not to employees of a joint employer, one part of which is a private entity."

ILLINOIS NURSES ASSOCIATION, Petitioner-Appellant. v. THE STATE LABOR RELATIONS BOARD *et al.*, Respondents-Appellees.

First District (5th Division) No. 85-3458

Order vacated and cause remanded.

Opinion filed June 5, 1987.

Petition for review of order of Illinois State Labor Relations Board.

JUSTICE LORENZ delivered the opinion of the court:

Petitioner, the Illinois Nurses Association (INA), appeals from the order of respondent, the Illinois State Labor Relations Board (the Board), dismissing INA's unfair labor practice charge for lack of jurisdiction.

We remand this cause for further proceedings pursuant to section 3-111(7) of the Administrative Review Law (Ill. Rev. Stat. 1985, ch. 110, par. 3-111(7)).

INA is a labor organization serving as the exclusive representative of certain classifications of registered professional nurses employed by the State of Illinois at numerous State-owned facilities, including the Shawnee Correctional Center. On March 29, 1985, Shawnee's warden signed a contract, effective April 4, 1985, with Correctional Medical Systems, Incorporated (CMS), in which CMS agreed to provide health care services at Shawnee.

On June 24, 1985, INA filed an unfair labor practice charge with the Board against the Illinois Department of Corrections (DOC) alleging that DOC had refused to bargain with INA concerning wages and other work conditions for certain workers at Shawnee despite a collective bargaining agreement between the State and INA as

to these employees. In the charge INA referred to these employees as "State of Illinois bargaining unit employees employed at Shawnee Correctional Center which the State of Illinois, Department of Corrections claims to be working for a sub-contractor but which is really a joint-employer with the State of Illinois."

Section 7 of the Illinois Public Labor Relations Act (the Act) (Ill. Rev. Stat. 1985, ch. 48, par. 1607) imposes a duty of collective bargaining upon public employers. Section 3(o) of the Act (Ill. Rev. Stat. 1985, ch. 48, par. 1603(o)) defines public employers as including the State, political subdivisions of the State, units of local governments, agencies of those entities, "and any person acting within the scope of his or her authority, express or implied, on behalf of such entities in dealing with its employees." The term "person" is defined in the Act as including associations and corporations. Ill. Rev. Stat. 1985, ch. 48, par. 1603(l).

The Board's chief administrator reviewed INA's charge, as well as certain INA supporting documents, including the contract between Shawnee and CMS and a position paper prepared by INA. The administrator held that even if the State and CMS, a private employer, were found to be joint employers, the Board would not have jurisdiction because "[t]he jurisdiction of the Board is limited to public employers and public employees." The dismissal order did not discuss whether CMS was acting on behalf of the State with respect to the affected employees. On appeal to the entire Board INA contended that the administrator should have found jurisdiction because CMS was acting on behalf of the State in providing nursing services at Shawnee. However, the Board

upheld the dismissal, finding that INA had presented no evidence to support its "further contention that CMS was acting as the agent of the State." Subsequently the Board denied INA's request for reconsideration, finding that INA had failed to raise the agency theory or to present evidence thereon during the administrator's investigation. INA was informed by the Board that should it wish to advance this theory it should file a new charge.

•1 Direct appeal was then taken to this court, pursuant to section 11(e) of the Act, which states in pertinent part:

> "A charging party or any person aggrieved by a final order of the Board * * * may * * * obtain judicial review * * * in accordance with the provisions of the Administrative Review Law * * * except that such judicial review shall be afforded directly in the appellate court * * * ." (Ill. Rev. Stat. 1985, ch. 48, par. 1611(e).)

In this court the Board again contends that the issue of whether CMS is a public employer, by virtue of its agency for the State, was not properly raised before the administrator below and therefore is not properly before us.

Clearly the administrator never addressed this issue, but it is also clear that INA did raise the issue before the administrator. The Board concedes that during the administrator's investigation INA gave him a copy of the CMS contract and an INA position paper. In that paper INA contended that CMS's employees were also employees of the State. INA further contended that CMS was in effect acting as an employment agency for DOC

and that control of the terms and conditions of employment of CMS employees remained primarily with DOC. As evidence of these assertions INA cited to various provisions of the CMS contract, which was also before the administrator.

Given these contentions and this evidence, all of which was presented to the administrator, we find that INA did raise in a timely fashion this contention that CMS, by virtue of its agency status with the State, was a public employer. However, as we have noted, this issue was not addressed by the administrator or by the Board. Consequently we have no factual findings to review.

•2 Pursuant to statutory authority this cause is before us, rather than the circuit court, on direct review from the administrative agency. (Ill. Rev. Stat. 1985, ch. 48, par. 1611(e).) That same statute also provides that in all other respects our judicial review is to be in accordance with the Administrative Review Law. Section 3-111(7) of the Administrative Review Law (Ill. Rev. Stat. 1985, ch. 110, par. 3-111(7)) permits the court to remand administrative review matters for the taking of additional evidence when such an action is just. Accordingly, pursuant to that statutory authority we vacate the order of dismissal entered by the Board and remand this cause to the administrator for further evidentiary proceedings pertaining to the determination of the jurisdiction of the Board to hear this cause.

The order of the Board is vacated and this cause is remanded for further proceedings.

Vacated and remanded with directions.

SULLIVAN, P.J., and PINCHAM, J., concur.

¶2028

ILLINOIS DEPTS. OF CENTRAL MANAGEMENT SERVICES & CORRECTIONS

Illinois State Labor Relations Board

Illinois Nurses Association, Charging Party, and State of Illinois, Department of Central Management Services and Department of Corrections, Respondent.

Case Nos. S-CA-100, Decision of SLRB
October 24, 1985

Before Brogan, Chairman; and Manning and Hilliard, Board Members

OPINION UPHOLDING DISMISSAL

On October 23, 1985, the Illinois State Labor Relations Board considered, at its public meeting, the Charging Party's appeal of the Chief Administrator's Dismissal, dated August 27, 1985, in the above-captioned case. The appeal is hereby denied, primarily for the reasons set forth in the Chief Administrator's Dismissal.

As noted by the Chief Administrator, this Board cannot assert jurisdiction in a joint employer situation unless each employer is a public employer, as defined in Section 3(n) of the Illinois Public Labor Relations Act, Ill. Rev. Stat. 1984 supp., ch. 48, par. 1601 et seq., subject to the Board's jurisdiction. Additionally, the Charging Party has presented no evidence to support its further contention that Correctional Medical Systems, the private employer involved herein, is the agent of the State of Illinois so as to bring it within our jurisdiction. Accordingly, the Chief Administrator's dismissal is upheld.

DISMISSAL

This charge alleges an unfair labor practice in violation of Section 10 of the Illinois Public Labor Relations Act (Ill. Rev. Stat. ch. 48, § 1601 et seq.). The charge has been carefully investigated in accordance with Section 11(a) of the Act and the Rules and Regulations of the Illinois State Labor Relations Board.

The investigation reveals that the charging party alleges that the State of Illinois (Employer) and Correctional Medical Systems, Inc. (Subcontractor) are joint employers under the Act. The charging party further claims that the Employer violated Section 10 of the Act by refusing to apply the terms and conditions of RC-23 to the nurses employed by the Subcontractor at the Shawnee Correctional Center. The Employer contends that the Subcontractor is the sole employer of these nurses, and that as such they are not covered by RC-23.

The Subcontractor is a private employer and, as such, the Illinois State Labor Relations Board does not have jurisdiction over it. The jurisdiction of the Board is limited to public employers and public employees. Even if the Employer and Subcontractor were found to be joint employers, the Board would still not have jurisdiction over these employees. In order for the Board to assert jurisdiction over a joint employer, it must have jurisdiction over each individual employer separately. *Santa Rosa Hospital*, FPER ¶13095 (Fla. 1982); *Fresno Unified School District/Abbey Transportation System, Inc.*, 3 PERC ¶10012 (Ca. Jan. 4, 1979).

Accordingly, the charge is hereby dismissed. The charging party or its representative may appeal this Dismissal to the Board at any time within 30 days of service thereof. Such appeal must be in writing, must contain the case caption and number, and must be addressed to Jacalyn Zimmerman, the Board's General Counsel, 111 North Canal Street, Suite 940, Chicago, Illinois 60606. The appeal must contain detailed reasons in support thereof, and must be served upon all other parties at the same time it is served on the Board. If no appeal is received with the time specified, this Dismissal will be final.

Excerpt from Petition for Appeal as a Matter of Right or, in the Alternative, for Leave to Appeal to the Illinois Supreme Court (Ill. Sup. Ct. No. 70131)—Filed by Illinois State Labor Relations Board, Illinois Department of Central Management Services and Illinois Department of Corrections.

I. APPEAL TO THIS COURT LIES AS A MATTER OF RIGHT BECAUSE THE APPELLATE COURT'S HOLDING – THAT THE ISLRB MUST DETERMINE THE MERITS OF INA'S UNFAIR LABOR PRACTICE CHARGE – RAISES A FEDERAL CONSTITUTIONAL ISSUE FOR THE FIRST TIME. THE ISLRB IS FEDERALLY PREEMPTED AND, THEREFORE, BARRED BY THE SUPREMACY CLAUSE, FROM EXERCISING JURISDICTION OVER THIS MATTER.

The ISLRB declined to exercise jurisdiction over INA's unfair labor practice charge because it concluded that the nurses employed by Systems were private employees of a private company. When the appellate court reversed the ISLRB's determination and ordered the ISLRB to address the merits of that charge, the court directed the ISLRB to undertake an act it is constitutionally prohibited from performing. Because a constitutional issue arises for the first time in and as a result of the appellate court's holding, appeal lies to this court as a matter of right. Ill. Rev. Stat. 1987, ch. 110A, ¶317.

The National Labor Relations Act ("NLRA"), 29 U.S.C. §151 *et seq.*, vests the NLRB with jurisdiction over labor relations matters, including charges of unfair labor practices concerning private employers and their employees. The NLRB's jurisdiction is exclusive. Under

the Supremacy Clause, States must defer to the NLRB with respect to activities over which the NLRB has jurisdiction – they are preempted from assuming jurisdiction over such activities.

The United States Supreme Court described the preemptive scope of the NLRA in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S. Ct. 773, 3 L.Ed.2d 775 (1959). The Court explained that given the NLRA's "complex and interrelated federal scheme of law, remedy, and administration," *id.* at 243, "due regard for the federal enactment requires that state jurisdiction must yield," *id.* at 244, when the activities purportedly subject to state regulation are even "arguably subject to §7 or §8 of the [NLRA]." *Id.* at 245. Preemption under *Garmon* is a jurisdictional bar that cannot be waived. *Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 106 S. Ct. 1904, 1913, 90 L.Ed.2d 389 (1986).

Numerous NLRB decisions make clear that jurisdiction over the controversy here in issue rests with the NLRB. *See, e.g., Koba Associates, Inc.*, 289 NLRB No. 33 (June 28, 1988); *Old Dominion Security, Inc.*, 289 NLRB No. 18 (June 14, 1988); *Community Interactions Bucks County, Inc*, 288 NLRB No. 115 (May 18, 1988); *Dynaelectron Corp., Aerospace Operations Division*, 286 NLRB No. 28 (September 30, 1987); *Trailways Commuter Transit, Inc.*, 284 NLRB No. 103 (July 10, 1987); *Long Stretch Youth Home, Inc.*, 280 NLRB 678 (1986). In each of these cases the NLRB asserted jurisdiction over private entities, like Systems in the case at bar, that contracted with public bodies to perform services for those bodies and retained control over the primary elements of the employment relationship.

In *Long Stretch Youth Home, Inc.*, for instance, the NLRB determined that it had jurisdiction over a private child care institution that contracted with the Maryland Social Services Administration to provide room and board, medical care, education, and social services to teenage boys who came from homes found to be unfit or who were expelled from the public school system. Long Stretch argued that the NLRB lacked jurisdiction over it because it performed essential State functions and because the State closely monitored and controlled its operations. The State issued cost guidelines suggesting minimum and maximum salary guidelines, required the facility to submit its budget annually, and reviewed the facility's personnel policies at the time of initial licensing and thereafter at license reevaluations. The State also required the facility to have personnel policies, to provide certain types of benefits, and to have certain staff positions in sufficient numbers. The State reviewed hiring decisions to ensure compliance with its minimum qualifications. It could veto a hiring decision if the worker did not possess minimum qualifications and it could fire workers found guilty of child abuse. The State required Long Stretch to provide workers with regularly scheduled hours and a minimum number of days off per week. With respect to Long Stretch's educational duties, the State set the curriculum, required teachers employed by Long Stretch to have the same credentials as public school teachers, and required Long Stretch to employ a principal with at least a master's degree in school administration.

The NLRB rejected Long Stretch's contention that it was the agent of the State and, therefore, a public

employer outside the NLRB's jurisdiction. The NLRB concluded that Long Stretch retained control over the economic terms and conditions of employment essential to meaningful bargaining. It found the State's requirement that certain job classifications be filled and that employees meet minimum qualifications to be "minimal limitations" that do not "significantly limit" Long Stretch's ability to engage in meaningful bargaining. The NLRB gave no weight to the State's control over what it termed the "operational aspects" of Long Stretch, i.e., the setting of school curriculum, the enforcement of child abuse legislation, etc. It also termed "minimal" the State's requirement that Long Stretch provide its employees with regularly scheduled hours, and time off.

The extent of the State's involvement with Systems in the instant case is far less than that found insufficient to divest the NLRB of jurisdiction in *Long Stretch*. The State's authority here is limited to overseeing security and professional licensing matters (but not soliciting, interviewing, hiring, or providing professional orientation), denying access to the facility (but not firing) Systems' employees who pose a security risk, setting minimum staffing levels and requiring that medical care be provided twenty-four hours a day, seven days a week (but not establishing individual work schedules or work assignments). The requirement that nurses employed by Systems attend in-service training concerned primarily with security regulations, and the requirement that they comply with security regulations, as well as Administrative and Institutional Directives, are merely the types of operational controls to which the NLRB gave no weight in *Long Stretch*. Such controls go to the issue of contract

compliance and not to the essential terms and conditions of employment.

Comparison of the facts at issue in *Long Stretch*, where the NLRB asserted jurisdiction, with those here in issue makes clear that the NLRB has jurisdiction over this matter. Accordingly, the ISLRB is federally preempted from exercising jurisdiction in this case.

The federal constitutional issue arises in this case solely from the appellate court's erroneous construction and application of the IPLRA. As will be shown in the following discussion, the IPLRA, if correctly construed and applied, does not require or even authorize the ISLRB to entertain the INA's unfair labor practice charge.

* * *

Excerpt from Petition for Appeal as a Matter of Right or, in the Alternative, for Leave to Appeal to the Illinois Supreme Court (Ill. Sup. Ct. No. 70132) – Filed by Correctional Medical Systems.

B. The National Labor Relations Act Preempts the ISLRB and State Court's Jurisdiction.

The Appellate Court's decision is in conflict with the Supremacy Clause of the Constitution and thus grants Systems an appeal of right based on preemption. Preemption, a constitutionally-based concept, is designed to "avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter." *Amalgamated Ass'n of Street, Elec. Ry. and Motor Coach Employees of Am. v. Lockridge*, 403 U.S. 274, 281, 91 S.Ct. 1909, 1917, reh. den. 404 U.S. 874 (1971). To protect employers and employees that are subject to federal control of labor relations from intrusion by state boards and courts, the Supreme Court has held that where "an activity is arguably subject to § 7 (right of union organization and collective bargaining) or § 8 (protection against the commission of unfair labor practices) of the (National) Act, the states as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). To allow the states to regulate conduct that "plainly (falls) within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law." *Id.* Where the potential for state regulation of federally preempted labor relations matters has

occurred, Illinois courts have not hesitated to dismiss for want of jurisdiction. *Illinois v. Federal Tool & Plastics Div. of V.C.A., supra; NDK Corp. v. Local 1550, United Food & Commercial Workers Int'l Union,* 470 N.E.2d 565, 128 Ill. App. 3d 207 (1984).

If a case is such that it falls within the jurisdiction of the NLRB, state administrative bodies are excluded from asserting jurisdiction. *Garner v. Teamsters Local Union No. 1,* 346 U.S. 485, 492-97, 74 S.Ct. 161 (1953). Even where the matter has not been presented to the NLRB for jurisdictional determination, if the facts are such as to suggest the matter is arguably covered by the National Act, preemption applies. *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. at 246; *Local 248, UAW v. Wisconsin Employment Relations Bd.,* 105 N.W.2d 271, 46 LRRM 3056, *cert. denied, Allis Chalmers Mfg. Co. v. UAW,* 365 U.S. 878 (1961). State labor boards have no jurisdiction to determine a union's representation of employees subject to NLRB jurisdiction. *Radio & Television Broadcast Technicians Local 1264 v. Broadcast Service Mobile, Inc.,* 380 U.S. 255, 85 S.Ct. 876 (1965); *Pari-mutuel Clerks Union Local 328 v. Fair Grounds Corp.,* 703 F.2d 913, 917 n.3, *cert. denied* 464 U.S. 846 (1983); *Western Pennsylvania School for the Deaf v. Commonwealth of Pennsylvania,* 64 Pa. Cmwlth 1, 438 A.2d 1025 (1982); *Local 248 UAW v. Wisconsin Employment Relations Board,* 105 N.W.2d 271, 46 LRRM 3056. Where a state board or court has asserted jurisdiction over employers subject to the NLRB, their decisions have been reversed or enjoined. *See e.g., Bethlehem Steel Co. v. New York State Labor Relations Bd.,* 330 U.S. 767, 67 S.Ct. 1026 (1947); *NLRB v. Comm. of Interns and Residents,* 566 F.2d 810 (2d Cir. 1977), *cert. denied,* 435 U.S. 904 (1978).

The National Labor Relations Act ("National Act"), 29 U.S.C. § 141, et seq., excludes from its jurisdiction public employees. The Illinois Act covers only public employees. The two statutes are written to compliment one another and avoid conflicting coverage. The problem of determining whether the employees of a private contractor performing work for a public entity are subject to the National Act or a State Act is not new. The NLRB developed the "control of essential terms of employment" test discussed above in *Res-Care* and *Long Stretch Youth Home* to guide when it would assert jurisdiction. NLRB cases make it clear the NLRB would assert jurisdiction over Systems and the Shawnee nurses. *Koba Associates, Inc.*, 289 NLRB No. 33 (1988); *Old Dominion Security, Inc.*, 289 NLRB No. 18 (1988); *Dynaelectron Corp., Aerospace Operations Div.*, 286 NLRB No. 28 (1987); *see also, Lancaster Guidance Center*, 16 PPER ¶ 16025 at pp. 59-60 (Pa. Labor Relations Board 1984).

The facts in the cited cases are virtually identical to those herein with the governmental entity controlling the hours of orientation, retaining the right to approve initial hire and continued employment, requiring employees to complete a pre-employment security check, retaining the right to terminate employees for violation of security or operational directives, dictating dress, specifying the hours of coverage, and providing contract monitoring including verification of hours worked. Also like here, in each case, the private employer retained exclusive control over the employees' wages and benefits. On such facts, the NLRB found the private employers alone retained the

right to engage in meaningful negotiations and the employees were subject to the NLRB's jurisdiction.[5]

The NLRB would assert jurisdiction over this matter. Accordingly, the ISLRB and the Illinois courts are pre-empted from asserting jurisdiction, and appeal should be granted as a matter of right.[6] *NDK Corp. v. Local 550, UFCW Int'l Union; Hodges Bedding Co. v. Pennsylvania Labor Relations Board,* 131 A.2d 93, 388 Pa. 333 (1957).

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[5] In *Correctional Medical Systems, Inc.*, 289 NLRB No. 103, 128 LRRM 1255 (1988), the NLRB declined to assert jurisdiction over Systems at the Iowa State Prison. The NLRB based its finding on Iowa DOC's retained control over the employees' wages and benefits, Systems' contract with DOC set minimum and maximum wage ranges, Systems' benefits were included in an employee handbook that could not be changed without DOC's approval, Iowa's DOC could not terminate Systems' without federal court approval, and staffing levels were set pursuant to a federal court Consent Decree. The facts herein are in no way similar.

[6] Preemption is jurisdictional, the state courts lack the very power to adjudicate the claims, and the issue may be raised at any time. *Int'l Longshoremen's Ass'n AFL-CIO v. Davis,* 476 U.S. 380, 398, 106 S.Ct. 1904, 1916 (1986).

* * *

CONSTITUTION OF THE UNITED STATES

Article VI, Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

NATIONAL LABOR RELATIONS ACT (NLRA)

29 U.S.C. § 152:

§ 152 Definitions

When used in this subchapter –

* * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C.A. § 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

NATIONAL LABOR RELATIONS ACT (NLRA)

29 U.S.C. § 157:

§ 157 Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

NATIONAL LABOR RELATIONS ACT (NLRA)

29 U.S.C. § 158:

158 Unfair Labor Practices

(a) It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made,

and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

* * *

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions

of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification –

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs latter:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159 and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the

labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

ILLINOIS PUBLIC LABOR RELATIONS ACT (IPLRA)

Ill Rev. Stat. ch. 48, ¶1603(f) & (o):

(f) "Exclusive representative" except with respect to non-State fire fighters and paramedics employed by fire departments and fire protection districts, non-State peace officers and peace officers in the State Department of State Police, means the labor organization which has been designated by the Board as the representative of a majority of public employees in an appropriate bargaining unit in accordance with the procedures contained herein, or historically recognized by the State of Illinois or any political subdivision of the State prior to the effective date of this Act as the exclusive representative of the employees in an appropriate bargaining unit or, after the effective date of this Act recognized by an employer upon evidence, acceptable by the Board, that the labor organization has been designated as the exclusive representative by a majority of the employees in an appropriate bargaining unit.

With respect to non-State fire fighters and paramedics employed by fire departments and fire protection districts, non-State peace officers and peace officers in the State Department of State Police, "exclusive representative" means the labor organization which has been designated by the Board as the representative of a majority of peace officers or fire fighters in an appropriate bargaining unit in accordance with the procedures contained herein, or historically recognized by the State of Illinois or any political subdivision of the State prior to the effective date of this amendatory Act of 1985, as the exclusive representative by a majority of the peace officers or fire

fighters in an appropriate bargaining unit or, after the effective date of this amendatory Act of 1985 recognized by an employer upon evidence, acceptable by the Board, that the labor organization has been designated as the exclusive representative by a majority of the peace officers or fire fighters in an appropriate bargaining unit.

* * *

(o) "Public employer" or "employer" means the State of Illinois; any political subdivision of the State, unit of local government or school district; authorities including departments, divisions, bureaus, boards, commissions or other agencies of the foregoing entities; and any person acting within the scope of his or her authority, express or implied, on behalf of such entities in dealing with its employees; provided, however, that the term "Public employer" or "employer" as used in this Act does not mean and shall not include the General Assembly of the State of Illinois and educational employers or employers as defined in the "Illinois Educational Labor Relations Act" enacted by the 83rd General Assembly as now or hereafter amended[6], except with respect to a state university in its employment of fire fighters. County boards and county sheriffs shall be designated as joint or co-employers of county peace officers appointed under the authority of a county sheriff. Nothing herein shall be construed to prevent the State Board or the Local Board from determining that employers are joint or co-employers.

ILLINOIS PUBLIC LABOR RELATIONS ACT (IPLRA)

Ill. Rev. Stat. ch. 48, ¶1605 (1989):

§ 5. Illinois Labor Relations Boards. (a) There is created the Illinois State Labor Relations Board ("State Board") which shall have jurisdiction over collective bargaining matters between employee organizations and the State of Illinois, excluding the General Assembly of the State of Illinois, between employee organizations and units of local government and school districts with a population not in excess of 1 million persons, and between employee organizations and the Regional Transportation Authority. The State Board shall consist of 3 members appointed by the Governor, with the advice and consent of the Senate. The Governor shall appoint to the State Board only persons who have had a minimum of 5 years of experience directly related to labor and employment relations in representing public employers, private employers or labor organizations; or teaching labor or employment relations; or administering executive orders or regulations applicable to labor or employment relations. At the time of his or her appointment, each member of the State Board shall be an Illinois resident. The Governor shall designate one member to serve as the Chairman of the State Board. The Chairman shall initially be appointed for a term of two years. The second member shall serve for a term of 3 years, and the third member shall serve a term of 4 years. Each subsequent member shall be appointed for a term of 4 years. Upon expiration of the term of office of any appointive member, that member shall continue to serve until a successor shall be appointed and qualified. In case of a vacancy, a successor

shall be appointed to serve for the unexpired portion of the term. The terms of members shall commence on the 4th Monday in January of the year they are appointed except that if the Senate is not in session at the time the initial appointments are made, the Governor shall make temporary appointments in the same manner successors are appointed to fill vacancies. A temporary appointment shall remain in effect no longer than 20 calendar days after the commencement of the next Senate session.

ILLINOIS PUBLIC LABOR RELATIONS ACT (IPLRA)

Ill. Rev. Stat. ch. 48, ¶1607 (1989):

§ 7. Duty to bargain. A public employer and the exclusive representative have the authority and the duty to bargain collectively set forth in this Section.

For the purposes of this Act, "to bargain collectively" means the performance of the mutual obligation of the public employer or his designated representative and the representative of the public employees to meet at reasonable times, including meetings in advance of the budget-making process, and to negotiate in good faith with respect to wages, hours, and other conditions of employment, not excluded by Section 4 of this Act,[1] or the negotiation of an agreement, or any question arising thereunder and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

The duty "to bargain collectively" shall also include an obligation to negotiate over any matter with respect to wages, hours and other conditions of employment, not specifically provided for in any other law or not specifically in violation of the provisions of any law. If any other law pertains, in part, to a matter affecting the wages, hours and other conditions of employment, such other law shall not be construed as limiting the duty "to bargain collectively" and to enter into collective bargaining agreements containing clauses which either supplement, implement, or relate to the effect of such provisions in other laws.

The duty "to bargain collectively" shall also include negotiations as to the terms of a collective bargaining agreement. The parties may, by mutual agreement, provide for arbitration of impasses resulting from their inability to agree upon wages, hours and terms and conditions of employment to be included in a collective bargaining agreement. Such arbitration provisions shall be subject to the Illinois "Uniform Arbitration Act"[2] unless agreed by the parties.

The duty "to bargain collectively" shall also mean that no party to a collective bargaining contract shall terminate or modify such contract, unless the party desiring such termination or modification:

(1) serves a written notice upon the other party to the contract of the proposed termination or modification 60 days prior to the expiration date thereof, or in the event such contract contains no expiration date, 60 days prior to the time it is proposed to make such termination or modification;

(2) Offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Board within 30 days after such notice of the existence of a dispute, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of 60 days after such notice is given to the other party or until the expiration date of such contract, whichever occurs later.

The duties imposed upon employers, employees and labor organizations by paragraphs (2), (3) and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization, which is a party to the contract, has been superseded as or ceased to be the exclusive representative of the employees pursuant to the provisions of subsection (a) of Section 9,[3] and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

Supreme Court, U.S.
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No. 90-404

In The

Supreme Court of the United States

October Term, 1990

ILLINOIS STATE LABOR RELATIONS BOARD, ILLINOIS DEPARTMENT OF CENTRAL MANAGEMENT SERVICES, AND ILLINOIS DEPARTMENT OF CORRECTIONS,

Petitioners,

v.

ILLINOIS NURSES ASSOCIATION,

Respondent.

On Petition For Writ Of Certiorari To The Illinois Appellate Court, First Judicial District

PETITIONERS' SUPPLEMENTAL BRIEF

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Petitioners,

v.

ILLINOIS NURSES ASSOCIATION,

Respondent.

On Petition For Writ Of Certiorari To The Illinois Appellate Court, First Judicial District

PETITIONERS' SUPPLEMENTAL BRIEF

The Petitioners respectfully submit this supplemental brief to call to the attention of this Court the advisory opinion issued by the National Labor Relations Board ("NLRB") in *Correctional Medical Systems, Inc. and Illinois Nurses Association and Illinois State Labor Relations Board (Petitioner)*, 299 NLRB No. 95 (NLRB Case No. AO-278).*

* The Petitioners informed this Court in their petition for certiorari that the Illinois State Labor Relations Board had

(Continued on following page)

The NLRB issued its advisory opinion on August 31, 1990, one day after Petitioners filed their petition for certiorari. The opinion is set out in full in the appendix hereto.

As set forth in the petition for certiorari, the Illinois State Labor Relations Board ("ISLRB") took the extraordinary step of seeking an advisory opinion from the NLRB because it was concerned that the National Labor Relations Act ("NLRA") preempted it from exercising jurisdiction over the labor relations matter here in issue, as ordered by the Illinois Appellate Court, First Judicial District. *Illinois Nurses Ass'n v. Illinois State Labor Relations Board*, 196 Ill. App. 3d 576, 554 N.E.2d 404 (1st Dist. 1990) (Cert. Petition, p. App. 3).

The NLRB's advisory opinion confirms the ISLRB's concerns. The NLRB has found that (1) Correctional Medical Systems, Inc. ("Systems") is an "employer" within the meaning of section 2(2) of the NLRA, 29 U.S.C. § 152(2); (2) Systems maintains sufficient control over the nurses it employees at Shawnee Correctional Center to engage in meaningful collective bargaining; and (3) the assertion of jurisdiction by the NLRB would effectuate the purposes and policies of the NLRA. (Supp. Brief, p. App. 12) The NLRB concluded on the basis of these

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(Continued from previous page)

petitioned the NLRB for an advisory opinion concerning the NLRB's jurisdiction over the labor relations matter at issue in this case. (Cert. Petition at 8, 10 n. 4, 13) Petitioners referenced this then-pending matter as *Illinois Departments of Central Management Services and Corrections*, NLRB Case No. AO-278.

findings that it would assert jurisdiction over the matter here in issue. (Supp. Brief, p. App. 13)

The NLRB's declaration as to the existence of its jurisdiction establishes that the matter here in issue is more than just "arguably subject to § 7 or § 8 of the [NLRA]." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). This matter clearly lies within the exclusive jurisdiction of the NLRB. The ISLRB is, therefore, federally preempted from adjudicating this dispute as ordered by the State appellate court. *International Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 391 (1986).

CONCLUSION

For these reasons, and for all of the reasons previously set forth, the petition for certiorari should be granted.

Respectfully submitted,

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September 17, 1990

299 NLRB No. 95 D–1442
Vienna, IL

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CORRECTIONAL MEDICAL SYSTEMS, INC.

and

ILLINOIS NURSES ASSOCIATION

and Case AO–278

ILLINOIS STATE LABOR RELATIONS BOARD
Petitioner

ADVISORY OPINION

Pursuant to Section 102.98(b) of the Board's Rules and Regulations, on June 25, 1990, the Illinois State Labor Relations Board (ISLRB) filed a petition for an advisory opinion as to whether the Board would assert jurisdiction over Correctional Medical Systems, Inc. (the Company). In pertinent part, the petition alleges that an unfair labor practice proceeding involving the Company (Case No. S–CA–100) is currently pending before the ISLRB;[1] that the rights and/or obligations of the parties to that proceeding turn on whether the Board would assert jurisdiction over the Company; and that this jurisdictional issue can be most expeditiously resolved through the Board's

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[1] The petition indicates that the unfair labor practice charge (alleging a refusal to bargain) was actually filed by the Union against the State of Illinois, Departments of Central Management Services and Corrections (DOC), and that the Company subsequently intervened. Aside from notifying the Board that it "concurs in the Petition for Advisory Opinion," DOC has not participated in the instant proceeding.

advisory opinion procedures. The Company, the Union, and the American Federation of State, County, and Municipal Employees, Council 31, AFL–CIO, as amicus curiae,[2] submitted statements responding to the ISLRB's petition.

Section 102.98(b) of the Board's Rules and Regulations provides that any State or territorial agency or court may petition the Board for an advisory opinion on whether it would decline to assert jurisdiction over parties then before the agency or court either (1) on the basis of its current standards, or (2) because the employing enterprise is not within the jurisdiction of the National Labor Relations Act. Here, the petition was filed by the ISLRB and specifically requests an opinion on whether the Company is within the jurisdiction of the NLRA.[3] Further, as fully discussed below, the ISLRB has already conducted a hearing and set forth relevant factual findings concerning the jurisdictional issue, and these factual findings have been upheld by the Illinois Appellate Court.[4] Accordingly, we find that the petition was

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[2] No party objects to AFSCME Council 31's participation as amicus curiae in this proceeding and such participation is granted.

[3] It is undisputed that the Company satisfies the Board's current commerce standards for asserting jurisdiction.

[4] Although the Union insists that we review afresh the hearing record if we decide to entertain the petition, we find that this would serve no useful purpose. Both the ISLRB and the Illinois Appellate Court have reviewed the record in the state proceeding, and both have reached essentially the same factual findings. For us to now review the record de novo and issue independent or contrary factual findings in this proceeding would simply muddy the waters – a result which both

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properly filed and that the jurisdictional issue raised may properly be addressed through the Board's advisory opinion procedures.[5]

I. The Relevant Facts

The ISLRB's decision issued in July 1988, on exceptions to the hearing officer's recommended opinion and order.[6] As noted by the Illinois Appellate Court on appeal,[7] the factual findings of the hearing officer and the ISLRB were for the most part similar, except that the hearing officer's findings were more comprehensive. The court summarized the relevant facts as follows:

> It is undisputed that [the Union] is the exclusive bargaining representative for nurses employed by the State, including nurses employed by the State to work at its correctional centers. In 1985, DOC entered into a non-bid contract with [the Company], a private corporation licensed to do business in Illinois and based in St. Louis, Missouri. [The Company],

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(Continued from previous page)

amicus and the Union itself strenuously argue we should avoid. For the purposes of this advisory opinion proceeding, therefore, we adopt the factual findings in the state proceeding as our own.

[5] The parties have not advised us, nor are we aware, of any unfair labor practice or representation proceedings involving the parties currently pending before the Board or its Regional Office.

[6] *State of Illinois, Departments of Central Management Services and Corrections*, 4 PERI para. 2034 (IL SLRB 1988).

[7] *Illinois Nurses Assn. v. Illinois State Labor Relations Board*, 196 Ill.App.3d 576, 554 N.E.2d 404 (Ill.App.Ct. 1990).

described in the contract as an independent contractor, has contracts to provide health services to correctional facilities in 16 states, including contracts with nine Illinois correctional facilities. Between April 1985 and June 1986, [the Company] was compensated on a cost-plus plan and provided all health care staff at [the Shawnee Correctional Center, a state facility in Vienna, Illinois], except for the health Care Unit Administrator, who was a DOC employee. (Since July 1987, this position has been staffed by a [company] employee.) Included among [company] staff are doctors, nurses, a dentist, psychiatrist and psychologist, a pharmacist, technicians, and clerical staff. Since July 1986, the contracts have provided that [the Company] is to be compensated on the basis of the number of inmates at Shawnee. Quarterly performance level adjustments may be made, as determined by DOC and [the Company] and approved by the Warden, if there are any deficiencies in the agreed-upon staffing level. All health equipment costing over $100 is owned by the State.

[The Company's] staff is required to represent DOC with local groups. [The Company] solicits, interviews, and hires the nurses. DOC has the right to approve the "initial and continued employment" of nurses and sets the minimum qualifications for them, *e.g.*, Illinois license, one-year experience, CPR certification with correctional nursing experience preferred. The contract also states certain details that the interviewer should focus on when questioning job applicants. Prior to starting work, each person hired by [the Company] must pass a DOC background check (for security purposes). The final hiring selection is subject to DOC's approval. (The [ISLRB] found that DOC did not

exercise this right but rather limited its involvement to overseeing security and professional licensing matters.)

The contract also gives DOC complete discretion to remove a nurse from Shawnee, although only [the Company] can terminate a staff member. If [the Company] does not remove the nurse from Shawnee at DOC's request, DOC can lock her out. In one case, [the Company] terminated a nurse after DOC conducted an investigation which resulted in the assistant warden requesting her termination. Nurses' personnel files must be kept at Shawnee; [the Company] keeps duplicate files in its St. Louis office.

DOC sets the minimum staffing and scheduling requirements, and specifies how many hours a week a nurse may work, approves all hours that have been worked, and the length of the meal period. DOC provides the meals on site (for security reasons). Requests for all absences and overtime must be processed according to DOC requirements and procedures. DOC requires that all nurses must be evaluated annually in accordance with applicable state rules. Although, in fact, [the Company] conducts the evaluations, DOC must verify them. DOC must approve all hours worked which must be kept on DOC timekeeping forms. DOC requires all nurses to wear white uniforms and its identification badges which identify them as contractual employees. New nurses must attend 40 hours of orientation given [sic] by DOC at the State of Illinois Training Academy in Springfield. Further, each year DOC requires all nurses to complete 40 hours of in-service training.

The contract states that nurses must comply with Administrative Regulations and Administrative Directives, as well as policies and procedures of DOC and Shawnee. The directives for

the health care unit were written by DOC Medical Director and approved by the Director of Corrections. From these directives, each institution develops its own Institutional Directives; at Shawnee, these were mostly written by a DOC employee and approved by the warden. Pursuant to these directives, the contract provides for a Health Care Services Review Committee which is made up of both DOC and [company] administrators. Its function is to review inmate complaints, infirmary care, mental health responses, health records, etc. Meeting minutes are given to the warden. The Shawnee nurse's manual "is the how-to guide for organizing, planning and administering" health care, and incorporates applicable directives in addition to other details as to how the work is to be performed. The manual was written by a [Company] employee, but after DOC's approval, became the property of DOC.

Nurses are hired as [Company] employees. [The Company] determines their pay rate and issues the checks from St. Louis. It provides all benefits, *e.g.* health insurance, retirement plan. Vacation time, sick leave, etc. are established by [the Company]. Only [the Company] can transfer, promote, discipline, and terminate a nurse. [The Company] pays unemployment and workers' compensation insurance premiums and all required employee taxes. However, the contract provides that [the Company] has a right to "seek representation and indemnification from the Attorney General's Office."

554 N.E.2d at 406 – 407. On June 1, 1990, the Illinois Supreme Court denied leave to appeal the decision of the

appellate court,[8] and thus the foregoing factual findings are appropriately considered final.

II. The Positions of the Parties

Based on its factual findings, the ISLRB concluded that it lacked jurisdiction over the Shawnee matter. Applying a "degree of control" test, the ISLRB found that the Company rather than the State was the employer of the nurses at Shawnee, and that the Company was not the State's "agent" within the meaning of the Illinois Public Labor Relations Act. Both the ISLRB and the Company take essentially the same position here, arguing that the State lacks sufficient control over the Shawnee nurses' primary terms and conditions of employment to preclude meaningful bargaining by the Company, and that the Board and not the ISLRB therefore has jurisdiction under the standards set forth in *Res-Care, Inc.*, 280 NLRB 670 (1986), and *Long Stretch Youth Home*, 280 NLRB 678 (1986).

The Union and amicus, on the other hand, take the position that the Board should decline to even entertain the ISLRB's petition for advisory opinion. Noting that the Illinois Appellate Court ultimately reversed the ISLRB's conclusions and held that the Company was the State's agent as a matter of law (because it was performing statutorily and constitutionally mandated government

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[8] 132 Ill.2d 545, 555 N.E.2d 376 (Ill.S.Ct. 1990). On July 19, 1990, the Illinois Supreme Court further denied leave to file a motion for reconsideration of the order denying leave to appeal.

duties, and because the State, while permitting the Company to control the nurses, retained the right and/or duty to control), the Union and amicus argue that the Board should defer to the court's ruling and dismiss the petition. Alternatively, the Union argues that the Board should find that the Company is exempt from NLRA jurisdiction.

III. Analysis and Conclusions

Although the Board has traditionally given careful consideration to state law declarations and interpretations, in the final analysis it is Federal rather than state law which governs whether an employer is within the Board's jurisdiction.[9] Further, while the Board has in certain circumstances declined to issue an advisory opinion in deference to state proceedings,[10] this is not such a circumstance. Accordingly, contrary to the urgings of the Union and amicus, we decline to defer to the Illinois Appellate Court's ruling.[11]

---

[9] See *New York Institute for the Blind*, 254 NLRB 664, 665 and 667 (1981) (citing *NLRB v. Natural Gas Utilities District of Hawkins County*, 402 U.S. 600 (1971)).

[10] See *SHA Realty*, 299 NLRB No. 41 (July 31, 1990), and *Box Tree Restaurant*, 235 NLRB 926 (1978), and cases cited there (declining to issue an advisory opinion where the State had conducted a representation election within the previous year and thus it was clear the the Board itself would not, at that time, entertain a representation petition among the same employees).

[11] As indicated earlier, however, we will defer to the court's underlying factual findings for the purposes of this proceeding.

As for the substantive issue presented, we find, in agreement with the ISLRB and the Company, that we would assert jurisdiction over the Company. The Company is clearly not an exempt "political subdivision" under Section 2(2) of the Act. That exemption has historically been interpreted to include only those entities that are either (1) created by the State, so as to constitute departments or administrative arms of the Government, or (2) administered by individuals who are responsible to public officials or to the general electorate.[12] As indicated by the court, the Company here is a private corporation doing business in several different States, and in fact is described as an independent contractor in its contract with DOC.

Nor is the Company exempt from jurisdiction under the principles of *Res-Care* and *Long Stretch Youth Home*, supra. In those cases, both of which issued the same day, the Board reaffirmed the holding of *National Transportation Service*, 240 NLRB 565 (1979), and rejected the so-called "intimate connection" test under which jurisdiction was withheld if the private employer performed functions that were intimately related to allegedly traditional government functions of the exempt entity. The Board held that the proper focus was rather on the extent of control retained by the employer over essential terms and conditions of employment and on the degree of control exercised by the exempt entity over the employer's labor relations policies; in short, on whether the employer retained "sufficient control over the employment conditions of its employees to engage in

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[12] See *Hawkins County*, supra.

meaningful collective bargaining." *Res-Care*, 280 NLRB at 674; *Long Stretch Youth Home*, 280 NLRB at 681 – 682. Applying this test, the Board in *Res-Care* declined jurisdiction because the exempt entity in that case approved the initial wages, wage ranges, and benefits contained in the employer's proposed operating budget, and also retained the discretion, pursuant to the contractual cost-plus-fixed-fee compensation system, to approve or disapprove any subsequent changes in those terms. In contrast, the Board in *Long Stretch Youth Home* asserted jurisdiction because, although the per-resident compensation system in that case effectively imposed a ceiling on the employer's total operating budget, there were no specific limits on employee compensation, i.e., the employer was free to pay either more or less than what the exempt entity suggested in its cost guidelines.

Based on the facts as found in the state proceeding, we find the instant case more like *Long Stretch Youth Home* than *Res-Care*. Thus, although the Company used to be compensated on a cost-plus basis, it is now compensated on a per-inmate basis by DOC. Moreover, as stated by the court, the Company determines the nurses' pay rate and provides all benefits, including health insurance.[13] As in

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[13] The ISLRB's complete findings concerning employee compensation were as follows:

> The record reveals that the Company has sole and complete control over the wages and fringe benefits received by the nursing staff. Salary ranges are set by the Company for each job classification based on surveys that it alone conducts. Annual increases are

(Continued on following page)

Long Stretch Youth Home, therefore, it is clear that the Company retains extensive if not exclusive control over employee compensation.[14]

(Continued from previous page)

> also determined by the Company based on job performance evaluations performed by Company employees. The State has no authority to recommend or review wage rates set by the Company. Paychecks are issued by the Company and it pays all unemployment and workers' compensation insurance, withholds income taxes and pays the employer's portion of social security security tax. The Company provides the staff with medical, dental and life insurance, a retirement plan, vacations and funeral and sick leave. The State has no input in establishing these benefits.

The hearing officer's findings were essentially the same as the ISLRB's:

> The nurses are paid pursuant to the Company's pay schedule, and their pay checks are on Company checks issued out of St. Louis. The nurses receive the same benefit package that the Company provides its employees (health and dental plan, life insurance, and retirement plan), and their right to receive paid holidays and vacations, sick leave, and leaves of absence are governed by the Company's rules. . . . In addition, the Company is responsible for paying unemployment and workers' compensation insurance for the nurses and withholds their state and federal taxes and remits the monies to the appropriate federal and state agencies and pays the employer's portion for their social security tax.

[14] It is this fact which primarily distinguishes this case from *Correctional Medical Systems,* 289 NLRB No. 103 (July 13, 1988), a case in which the Board declined to assert jurisdiction

(Continued on following page)

As outlined by the court, DOC does exercise a significant degree of control over certain personnel policies such as hiring selection, staffing, scheduling, and uniforms. However, we find that this operational control would not preclude meaningful bargaining. As indicated by the court, the control is exercised largely for security reasons, and although DOC could go so far as to remove a nurse from Shawnee, only the Company could actually terminate the nurse's employment. The Board has asserted jurisdiction under similar circumstances in several previous cases following *Res-Care* and *Long Stretch Youth Home,*[15] and we accordingly would do likewise here.

In sum, we find that the Company is an employer within the meaning of Section 2(2) of the Act; that the Company retains sufficient control over the Shawnee nurses' terms and conditions of employment to engage in meaningful collective bargaining; and that it would therefore effectuate the purposes and policies of the Act to assert jurisdiction over the Company.

(Continued from previous page)

over the Company with respect to its operations at an Iowa correctional facility. In that case, the contract between the Company and the Iowa State Penitentiary incorporated a civil rights consent decree which effectively limited the Company's discretion over wages and benefits, thus making that case more like *Res-Care.*

[15] See *Koba Associates,* 289 NLRB No. 33 (June 28, 1988); *Old Dominion Security,* 289 NLRB No. 18 (June 14, 1988); *Dynaelectron Corp.,* 286 NLRB 302 (1987); and *Rustman Bus Co.,* 282 NLRB 152 (1986).

Accordingly, the parties are advised that, based on the facts as found in the state proceeding, the Board would assert jurisdiction over the Company.

Dated, Washington, D.C. August 31, 1990

James M. Stephens, Chairman

Mary Miller Cracraft, Member

Dennis M. Devaney, Member

Clifford R. Oviatt, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

(3)

No. 90-404

Supreme Court, U.S.
FILED
SEP 24 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

ILLINOIS STATE LABOR RELATIONS BOARD, ILLINOIS DEPARTMENT OF CENTRAL MANAGEMENT SERVICES, AND ILLINOIS DEPARTMENT OF CORRECTIONS,
Petitioners,

v.

ILLINOIS NURSES ASSOCIATION,
Respondent,

v.

CORRECTIONAL MEDICAL SYSTEMS, INC.,
Respondent.

On Petition For a Writ of Certiorari to the Illinois Appellate Court, First Judicial District

RESPONDENT CORRECTIONAL MEDICAL SYSTEMS, INC.'S RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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September 24, 1990

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RESPONDENT CORRECTIONAL MEDICAL SYSTEM, INC.'S RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondent, Correctional Medical Systems, Inc.,[1] pursuant to Supreme Court Rule 12.4, files this Response in support of the Petition for Writ of Certiorari. Correctional Medical Systems, Inc. respectfully urges the Court to grant the Petition for all of the reasons set forth therein.

In further support of the Petition, Correctional Medical Systems, Inc. observes that, after the Petition for Writ of Certiorari was filed, the National Labor Relations Board ("NLRB") issued an Advisory Opinion on August 31, 1990[2], on the jurisdictional question in this case. In its Advisory Opinion, the NLRB decided that it would assert jurisdiction over Correctional Medical Systems, Inc. as a private employer within the meaning of Section 2(2) of the National Labor Relations Act, 29 U.S.C. § 152(2)[3], and over the employees who are the subject of this case.

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[1] Correctional Medical Systems, Inc. was Intervenor-Appellee below. Correctional Medical Systems, Inc.'s parent corporation is ARA Health Services, Inc., whose parent corporation is ARA Medical Services Company, whose parent corporation is the ARA Group, Inc., a privately-held company.

[2] A copy of the NLRB's Advisory Opinion appears in the Appendix to this Response.

[3] The relevant constitutional and statutory provisions are set forth in the Petition's Appendix.

The NLRB's Advisory Opinion squarely conflicts with the ruling of the Illinois Appellate Court below, which holds that Correctional Medical Systems, Inc. is a public employer covered by the Illinois Public Labor Relations Act, Ill. Rev. Stat. Ch. 48, ¶ 1603, 1605 and 1607 (1989), and that the employees are "public" employees. The NLRB's Advisory Opinion resolves the jurisdictional issue, and the Illinois Appellate Court's ruling below is federally preempted. See Bethleham Steel Co. v. New York Labor Relations Board, 330 U.S. 767 (1947); NRLB v. Committee of Interns & Residents, 566 F.2d 810 (2nd Cir. 1977).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted. Correctional Medical Systems, Inc., respectfully suggests summary disposition in this case is appropriate: either summarily reversing the Illinois Appellate Court's decision, or vacating and remanding to that court for reconsideration in light of the NLRB's Advisory Opinion.

Respectfully submitted,

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Attorneys for Respondent
Correctional Medical Systems, Inc.

* Counsel of Record

September 24, 1990

APPENDIX

SCDO

299 NLRB No. 95D--1442

Vienna, IL

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

CORRECTIONAL MEDICAL SYSTEMS, INC.

and

ILLINOIS NURSES ASSOCIATION Case AO--278

and

ILLINOIS STATE LABOR RELATIONS BOARD
Petitioner

ADVISORY OPINION

Pursuant to Section 102.98(b) of the Board's Rules and Regulations, on June 25, 1990, the Illinois State Labor Relations Board (ISLRB) filed a petition for an advisory opinion as to whether the Board would assert jurisdiction over Correctional Medical Systems, Inc. (the Company). In pertinent part, the petition alleges that an unfair labor practice proceeding involving the Company (Case No. 5-- CA--100) is currently pending

before the ISLRB[1]; that the rights and/or obligations of the parties to that proceeding turn on whether the Board would assert jurisdiction over the Company; and that this jurisdictional issue can be most expeditiously resolved through the Board's advisory opinion procedures. The Company, the Union, and the American Federation of State, County, and Municipal Employees, Council 31, AFL--CIO, as amicus curiae[2], submitted statements responding to the ISLRB's petition.

Section 102.98(b) of the Board's Rules and Regulations provides that any State or territorial agency or court may petition the Board for an advisory opinion on whether it would decline to assert jurisdiction over parties then before the agency or court either (1) on the basis of its current standards, or (2) because the employing enterprise is not within the jurisdiction of the National Labor Relations Act. Here, the petition was filed by the ISLRB and specifically requests an opinion on whether the Company is within the jurisdiction of the NLRA.[3] Further, as fully discussed below, the ISLRB has already conducted a hearing and set forth relevant factual findings concerning the jurisdictional issue, and these factual

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[1] The petition indicates that the unfair labor practice charge (alleging a refusal to bargain) was actually filed by the Union against the State of Illinois, Departments of Central Management Services and Corrections (DOC), and that the Company subsequently intervened. Aside from notifying the Board that it "concurs in the Petition for Advisory Opinion," DOC has not participated in the instant proceeding.

[2] No party objects to AFSCME Council 31's participation as amicus curiae in this proceeding and such participation is granted.

[3] It is undisputed that the Company satisfies the Board's current commerce standards for asserting jurisdiction.

findings have been upheld by the Illinois Appellate Court.[4] Accordingly, we find that the petition was properly filed and that the jurisdictional issue raised may properly be addressed through the Board's advisory opinion procedures.[5]

I. The Relevant Facts

The ISLRB's decision issued in July 1988, on exceptions to the hearing officer's recommended opinion and order.[6] As noted by the Illnois Appellate Court on appeal[7], the factual findings of the hearing officer and the ISLRB were for the most part similar, except that the hearing officer's findings were more

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[4] Although the Union insists that we review afresh the hearing record if we decide to entertain the petition, we find that this would serve no useful purpose. Both the ISLRB and the Illinois Appellate Court have reviewed the record in the state proceeding, and both have reached essentially the same factual findings. For us to now review the record de novo and issue independent or contrary factual findings in this proceeding would simply muddy the waters--a result which both amicus and the Union itself strenuously argue we should avoid. For the purposes of this advisory opinion proceeding, therefore, we adopt the factual findings in the state proceeding as our own.

[5] The parties have not advised us, nor are we aware, of any unfair labor practice or representation proceedings involving the parties currently pending before the Board or its Regional Office.

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comprehensive. The court summarized the relevant facts as follows:

> It is undisputed that [the Union] is the exclusive bargaining representative for nurses employed by the State, including nurses employed by the State to work at its correctional centers. In 1985, DOC entered into a non-bid contract with [the Company], a private corporation licensed to do business in Illinois and based in St. Louis, Missouri. [The Company], described in the contract as an independent contractor, has contracts to provide health services to correctional facilities in 16 states, including contracts with nine Illinois correctional facilities. Between April 1985 and June 1986, [the Company] was compensated on a cost-plus plan and provided all health care staff at [the Shawnee Correctional Center, a state facility in Vienna, Illinois], except for the Health Care Unit Administrator, who was a DOC employee. (Since July 1987, this position has been staffed by a [company] employee.) Included among [company] staff are doctors, nurses, a dentist, psychiatrist and psychologist, a pharmacist, technicians, and clerical staff. Since July 1986, the contracts have provided that [the Company] is to be compensated on the basis of the number of inmates at Shawnee. Quarterly performance level adjustments may be made, as determined by DOC and [the Company] and approved by the Warden, if there are any deficiencies in the agreed-upon staffing level. All health equipment costing over $100 is owned by the State.

[The Company's] staff is required to represent DOC with local groups. [The Company] solicits, interviews, and hires the nurses. DOC has the right to approve the "initial and continued employment" of nurses and sets the minimum qualifications for them, e.g., Illinois license, one-year experience, CPR certification with correctional nursing experience preferred. The contract also states certain details that the interviewer should focus on when questioning job applicants. Prior to starting work, each person hired by [the Company] must pass a DOC background check (for security purposes). The final hiring selection is subject to DOC's approval. (The [ISLRB] found that DOC did not exercise this right but rather limited its involvement to overseeing security and professional licensing matters.)

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534 N.E.2d at 406--407. On June 1, 1990, the Illinois Supreme Court denied leave to appeal the decision of the appellate court[8], and thus the foregoing factual findings are appropriately considered final.

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[8] 132 Ill.2d 545, 555 N.E.2d 376 (Ill.S.Ct. 1990). On July 19, 1990, the Illinois Supreme Court further denied leave to file a motion for reconsideration of the order denying leave to appeal.

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employer is within the Board's jurisdiction.[9] Further, while the Board has in certain circumstances declined to issue an advisory opinion in deference to state proceedings,[10] this is not such a circumstance. Accordingly, contrary to the urgings of the Union and amicus, we decline to defer to the Illinois Appellate Court's ruling.[11]

As for the substantive issue presented, we find, in agreement with the ISLRB and the Company, that we would assert jurisdiction over the Company. The Company is clearly not an exempt "political subdivision" under Section 2(2) of the Act. That exemption has historically been interpreted to include only those entities that are either (1) created by the State, so as to constitute departments or administrative arms of the Government, or (2) administered by individuals who are responsible to public officials or to the general electorate.[12] As indicated by the court, the Company here is a private corporation doing business in several different States,

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[11] As indicated earlier, however, we will defer to the court's underlying factual findings for the purposes of this proceeding.

[12] See Hawkins County, supra.

and in fact is described as an independent contractor in its contract with DOC.

Nor is the Company exempt from jurisdiction under the principles of Res-Care and Long Stretch Youth Home, supra. In those cases, both of which issued the same day, the Board reaffirmed the holding of National Transportation Service, 240 NLRB 565 (1979), and rejected the so-called "intimate connection" test under which jurisdiction was withheld if the private employer performed functions that were intimately related to allegedly traditional government functions of the exempt entity. The Board held that the proper focus was rather on the extent of control retained by the employer over essential terms and conditions of employment and on the degree of control exercised by the exempt entity over the employer's labor relations policies; in short, on whether the employer retained "sufficient control over the employment conditions of its employees to engage in meaningful collective bargaining." Res-Care, 280 NLRB at 674; Long Stretch Youth Home, 280 NLRB at 681--682. Applying this test, the Board in Res-Care declined jurisdiction because the exempt entity in that case approved the initial wages, wage ranges, and benefits contained in the employer's proposed operating budget, and also retained the discretion, pursuant to the contractual cost-plus-fixed-fee compensation system, to approve or disapprove any subsequent changes in those terms. In contrast, the Board in Long Stretch Youth Home asserted jurisdiction because, although the per-resident compensation system in that case effectively imposed a ceiling on the employer's total operating budget, there were no specific limits on employee compensation, i.e., the employer was free to pay either more or less than

what the exempt entity suggested in its cost guidelines.

Based on the facts as found in the state proceeding, we find the instant case more like Long Stretch Youth Home than Res-Care. Thus, although the Company used to be compensated on a cost-plus basis, it is not compensated on a per-inmate basis by DOC. Moreover, as stated by the court, the Company determines the nurses' pay rate and provides all benefits, including health insurance.[13] As in Long Stretch Youth Home,

[13] The ISLRB's complete findings concerning employee compensation were as follows: The record reveals that the Company has sole and complete control over the wages and fringe benefits received by the nursing staff. Salary ranges are set by the Company for each job classification based on surveys that it alone conducts. Annual increases are also determined by the Company based on job performance evaluations performed by Company employees. The State has no authority to recommend or review wage rates set by the Company. Paychecks are issued by the Company and it pays all unemployment and workers' compensation insurance, withholds income taxes and pays the employer's portion of social security security [sic] tax. The Company provides the staff with medical, dental and life insurance, a retirement plan, vacations and funeral and sick leave. The State has no input in establishing these benefits.

The hearing officer's findings were essentially the same as the ISLRB's: The nurses are paid pursuant to the Company's pay schedule, and their pay checks are on Company checks issued out of St. Louis. The nurses receive the same benefit package that the Company provides its employees (health and dental plan, life insurance, and retirement plan), and

(Continued on next page)

therefore, it is clear that the Company retains extensive if not exclusive control over employee compensation.[14]

As outlined by the court, DOC does exercise a significant degree of control over certain personnel policies such as hiring selection, staffing, scheduling, and uniforms. However, we find that this operational control would not preclude meaningful bargaining. As indicated by the court, the control is exercised largely for security reasons, and although DOC could go so far as to remove a nurse from Shawnee, only the Company could actually terminate the nurse's employment. The Board has asserted jurisdiction under similar circumstances in several previous cases following Res-

[13] *(Continued from previous page)*

their right to receive paid holidays and vacations, sick leave, and leaves of absence are governed by the Company's rules.... In addition, the Company is responsible for paying unemployment and workers' compensation insurance for the nurses and withholds their state and federal taxes and remits the monies to the appropriate federal and state agencies and pays the employer's portion for their social security tax.

[14] It is this fact which primarily distinguishes this case from Correctional Medical Systems, 289 NLRB No. 103 (July 13, 1988), a case in which the Board declined to assert jurisdiction over the Company with respect to its operations at an Iowa correctional facility. In that case, the contract between the Company and the Iowa State Penitentiary incorporated a civil rights consent decree which effectively limited the Company's discretion over wages and benefits, thus making that case more like Res-Care.

Care and Long Stretch Youth Home,[15] and we accordingly would do likewise here.

In sum, we find that the Company is an employer within the meaning of Section 2(2) of the Act; that the Company retains sufficient control over the Shawnee nurses' terms and conditions of employment to engage in meaningful collective bargaining; and that it would therefore effectuate the purposes and policies of the Act to assert jurisdiction over the Company.

Accordingly, the parties are advised that, based on the facts as found in the state proceeding, the Board would assert jurisdiction over the Company.

Dated, Washington D.C. August 31, 1990.

James M. Stephens, Chairman

Mary Miller Cracraft, Member

Dennis M. Devaney, Member

Clifford R. Oviatt, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[15] See Koba Associates, 289 NLRB No. 33 (June 28, 1988); Old Dominion Security, 289 NLRB No. 18 (June 14, 1988); Dynaelectron Corp., 286 NLRB 302 (1987); and Rustman Bus Co., 282 NLRB 152 (1986).

Supreme Court, U.S.
FILED
OCT 3 1990
JOSEPH F. SPANIOL, JR.
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(5)

No. 90-404

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ILLINOIS STATE LABOR RELATIONS BOARD, ILLINOIS DEPARTMENT OF CENTRAL MANAGEMENT SERVICES and ILLINOIS DEPARTMENT OF CORRECTIONS,
Petitioners,

v.

ILLINOIS NURSES ASSOCIATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Illinois Appellate Court, First Judicial District

RESPONDENT ILLINOIS NURSES ASSOCIATION'S BRIEF IN OPPOSITION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Are there valid considerations for granting a writ of certiorari in this matter?
2. Where a State retains the right and has the obligation to control the performance of non-delegable, constitutionally mandated work it has contracted with a private company to provide on its behalf, can a state labor relations board assume jurisdiction over the company and its employees?
3. Have Petitioners waived their pre-emption claim?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-404

ILLINOIS STATE LABOR RELATIONS BOARD, ILLINOIS DEPARTMENT OF CENTRAL MANAGEMENT SERVICES and ILLINOIS DEPARTMENT OF CORRECTIONS,
Petitioners,

v.

ILLINOIS NURSES ASSOCIATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Illinois Appellate Court, First Judicial District

---

RESPONDENT ILLINOIS NURSES ASSOCIATION'S BRIEF IN OPPOSITION

ADDITIONAL STATUTORY PROVISION

Section 3(n) of the Illinois Public Labor Relations Act, Ill. Rev. Stat. ch. 48 ¶ 1603(n) (1989).

STATEMENT OF THE CASE

On June 24, 1985, the Illinois Nurses Association, "INA", filed an unfair labor practice charge with the Illinois State Labor Relations Board, "ISLRB". (R.

C-3&80)[1] (App. pp. 1a-3a) The charge alleged the Illinois Department of Corrections, "DOC", committed an unfair labor practice by failing to apply the terms of a collective bargaining agreement between the INA and the State of Illinois, to registered nurses, "RNs", employed at the DOC's Shawnee Correctional Center, "Shawnee". (App. pp. 1a-3a) The DOC took the position that the RNs were employed by a private employer, Correctional Medical Systems, Inc., "Systems". The INA contended the subcontract between the DOC and Systems evidenced a joint-employer relationship, making the RNs public employees and bringing Systems within the Illinois Public Labor Relations Act's, "IPLRA," definition of "public employer". (Ill. Rev. Stat. ch. 48, ¶ 1603(n) & (o) 1989).)

The ISLRB dismissed the charge on October 24, 1985, holding it had no jurisdiction over Systems. (R. C-35) The Illinois Appellate Court for the First District reversed and remanded the dismissal instructing the ISLRB to hold an evidentiary hearing on the issue, whether "[Systems], by virtue of its agency status with the State, was a public employer". *Illinois Nurses Assn. v. ISLRB*, 156 Ill. App. 3d 841, 843, 509 N.E.2d 1307, 1309 (1987). (R. C-75-77)

A two-day evidentiary hearing was held before a hearing officer of the ISLRB on September 8 and 9, 1987. (R. 1-1026) The hearing officer found that although Systems was a joint-employer with the DOC of the RNs and would not be capable of engaging in effective and meaningful bargaining without the DOC, Systems was not an agent of the DOC; and, therefore, he dismissed the charge. (R. 1146-1150) On July 20, 1988, the ISLRB upheld the dismissal. (R. 1318)

---

[1] The record on appeal contains duplicate numbering. Documents up to the administrative hearing are designated "R. C". Beginning with the transcript of the administrative hearing, the remainder of the record is designated "R.".

On March 30, 1990, the Illinois Appellate Court for the First District, again reversed and remanded the ISLRB's decision holding Systems to be both an agent of and a joint-employer with the DOC. *Illinois Nurses Assn. v. ISLRB*, 196 Ill. App. 3d 576, 583, 554 N.E.2d 404, 409 (1990). The Illinois Supreme Court denied the ISLRB's and Systems' petitions for appeal on June 1, 1990, and their motions for reconsideration on July 19, 1990.

The ISLRB, after the Illinois Supreme Court's first denial, then filed a petition for an advisory opinion with the National Labor Relations Board, "NLRB". The NLRB, on August 31, 1990, advised it would assert jurisdiction over Systems based on its decision in *Long Stretch Youth Home*, 280 NLRB 678 (1986). *Correctional Medical Systems, Inc.*, 299 NLRB No. 95 (1990).

SUMMARY OF THE ARGUMENT

I

A number of reasons exist for this Court to deny the petition for writ of certiorari.

II

States, including Illinois, have a constitutional duty to provide adequate medical care to incarcerated individuals. The right to control the manner in which the medical care is performed rests with the State. As such, individuals who perform the work are "servants" of the State. When the Illinois DOC contracted with a private company to provide health care at Shawnee, the company became an agent of the DOC and the company's employees were "servants" of the DOC.

Pursuant to the IPLRA's definitions of public employer and employee, the ISLRB had jurisdiction over the company and individuals providing medical care at Shawnee. Since the parties to this matter are not covered by the

National Labor Relations Act, "NLRA", no pre-emption issue exists.

III

This case went through two administrative proceedings and two appeals to the Illinois appellate court without pre-emption being raised as an issue. Raising it now is not timely, and, therefore, Petitioners waived the pre-emption claim.

REASONS FOR DENYING THE WRIT

I. CONSIDERATIONS FOR GRANTING A WRIT OF CERTIORARI ARE NOT PRESENT

Rule 10 provides the Court with certain considerations governing review on a petition for certiorari. Sup. Ct. R. 10. None of the considerations set forth are met in this case and there are no "special and important reasons" for granting the writ. *Id.*

Contrary to Petitioners' assertion, there is no conflict between the appellate court's decision and decisions of this Court, United States Courts of Appeals, or the NLRB. As is explained below, the parties to this matter are not covered by federal labor law. This case concerns a fact-specific subcontract and the employment relationship between a state agency, a private company, their employees and a collective bargaining representative. It is a matter of a state appellate court applying common and state statutory law to the specific contract between the state agency and the company.

Justice Frankfurter set forth a number of reasons this Court may deny a petition for certiorari in *Maryland v. Baltimore Radio Show*, 388 U.S. 912 (1950). At least three reasons apply here, including that there is no judgment of a State court of last resort and that the decision below is supportable as a matter of State law and decisions of this Court. *Id.* at 918.

Third, Petitioners' claim notwithstanding, the decision of the appellate court remanding this cause to the

ISRLB is not a final judgment. *Wilkey v. The Illinois Racing Board*, 96 Ill. 2d 245, 449 N.E.2d 843 (1983). The appellate court's remand instructed the ISLRB to hear the merits of the INA's unfair labor practice charge. Illinois law instructs, ". . . where a cause is remanded for a new trial or other further proceedings involving disputed questions of law or fact, the judgment of the Appellate Court is not of a final character." *Cory Corp. v. Fitzgerald*, 403 Ill. 409, 414, 86 N.E.2d 363, 366 (1949).

The Illinois Supreme Court twice denied Petitioners' request to hear this matter. The absence of any reason for review requires this Court do the same.

II. THE APPELLATE COURT'S DECISION DOES NOT CONFLICT WITH FEDERAL LAW

A. The Constitutional And Statutory Obligation Of The DOC To Provide Adequate Medical Care To Incarcerated Individuals Mandated The Illinois Appellate Court's Decision That The RNs Were DOC Employees And Systems Was DOC's Agent.

The Illinois DOC has an obligation to provide adequate medical care to incarcerated individuals housed at its correctional facilities. (Ill. Rev. Stat. ch. 38, ¶ 1003-7-2(d) (1985).) Contracting-out such medical care does not relieve the State of its constitutional duty. *West v. Atkins*, 487 U.S. 42 (1988). Although that case was a § 1983 action brought by a prisoner against North Carolina, the rule enunciated by the Court applies with equal force to the appellate court's analysis in the present matter. Reversing the Fourth Circuit's holding that a contract physician was not acting under color of state law in treating the inmate's injury, the Court stated:

> In the State's employ, respondent worked as a physician at the prison hospital fully vested with state authority to fulfill essential aspects of the duty,

> placed on the State by the Eighth Amendment and state law, to provide essential medical care to those the State had incarcerated.

Id. at 57. Similarly, the RNs who provide medical care to the inmates at Shawnee are in the employ of DOC and are state actors. By statute and as a matter of constitutional duty, the Shawnee RNs are responsible to the DOC for the work they perform on behalf of the State of Illinois. Thus, they work under the supervision of the DOC's medical director and the rules he promulgated. (R. 218-223, 381-446)

As *West* dictates, the DOC has the absolute obligation to control the manner in which the medical care is provided at Shawnee and cannot delegate this responsibility to another, whether to one contract physician or a company whose only purpose is to contract with states to provide medical services to their correctional facilities. Therefore, a private entity, such as Systems, which contracts with the DOC to provide medical services, does so on behalf of and under the supervision and control of the DOC. The individuals performing the work of the contractual entity owe a duty to provide adequate medical care to the DOC and the inmates, not the contractor. It is as if the contractor is merely an intermediate supervisor employed by the DOC to supervise the work, since the right and duty to perform the work remains at all times with the DOC.

The appellate court's conclusion that the DOC was the employer of the RNs and Systems an agent of the DOC was the correct application of constitutional and statutory law.

B. The Illinois Appellate Court Appropriately Applied The Agency Test When It Determined The Shawnee RNs Were Employed By The Illinois DOC And Systems Was DOC's Agent.

Both the NLRA and the IPLRA define "employee". (29 U.S.C. § 152(3); Ill. Rev. Stat. ch. 48, ¶ 1603(n) (1989). To determine whether an individual is an employee of an employer or an independent contractor, the common-law test of agency is used. *NLRB v. United Insurance Co.*, 390 U.S. 254 (1968).

In finding the DOC was the RNs' employer and Systems was DOC's agent, the appellate court applied this common-law test to the facts of the case: ". . . the right to control [the Shawnee nurses] is by the agreement and law in the DOC, not Systems." 196 Ill. App. 3d at 582, 554 N.E.2d at 408. *Restatement (Second) of Agency* § 220 (1958) defines "servant (employee)" as:

> a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or *right of control.* (Emphasis added.)

This test is broadly applied by both federal and Illinois courts at common-law and in numerous statutory contexts, including the NLRA.

In a NLRA case, *NLRB v. United Insurance Co.*, 390 U.S. at 256, this Court said, ". . . there is no doubt that we should apply the common-law agency test here in distinguishing an employee from an independent contractor." Under the Federal Employer's Liability Act, this Court found the critical determinant to establish an employment or master-servant relationship was the "control or right to control" the performance of the work. *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 325 (1974).

Similarly, Illinois courts utilize the same test for purposes of construing state statutes and applying the com-

mon law. For instance, in *Bob Neal Pontiac-Toyota, Inc. v. The Industrial Commission*, 89 Ill. 2d 403, 410, 433 N.E.2d 678, 681 (1982), the Illinois Supreme Court found that among various factors to be considered in resolving a worker's status under the Illinois Worker's Compensation Act, ". . . the right to control the manner in which the work is done is the most important. (Citations omitted.)" See also: *Merlo v. Public Service Company of Northern Illinois*, 381 Ill. 300, 45 N.E. 665 (1942) (negligence); and, *Kouba v. East Joliet Bank*, 135 Ill. App. 3d 264, 481 N.E.2d 325 (1985) (wrongful repossession).

The appellate court, in the present case, correctly used the same test to interpret the IPLRA and found the Shawnee RNs were employees of the DOC. The right to control the performance of the work contracted to Systems was vested in the DOC. As such, the RNs were public employees and Systems was the DOC's agent.

The NLRB recently issued an advisory opinion in this matter and determined it would assert jurisdiction over Systems. *Correctional Medical Systems*, 299 NLRB No. 95 (1990). In *National Transportation Service, Inc.*, 240 NLRB 565 (1979), the NLRB developed a two-prong test for deciding whether or not to assert jurisdiction in cases involving both a governmental entity and a private employer. Part one of the test required defining the employer. If part one was met, part two required answering whether the "degree of control" over subjects of bargaining retained by the employer was sufficient to enable it to negotiate with a labor organization representing the employees.

In its advisory opinion, the NLRB made the same error committed by the ISLRB in its administrative decision—both boards began their analysis with part two, the "degree of control" test, rather than first defining the employer. This fundamental error was recognized by the appellate court when it said, ". . . the initial task is

to define the employer before applying the degree of control test." 196 Ill. App. 3d at 581, 554 N.E.2d at 407. By improperly applying the test, both boards came to the same erroneous conclusion.

C. This Case Does Not Present A Federal Pre-emption Issue.

This case concerns whether or not Illinois has jurisdiction, including IPLRA jurisdiction, over the providers of medical care at its correctional facilities. It does not concern activities or conduct arguably within the scope of the NLRA. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

The appellate court found the duty to provide medical care rendered by the Shawnee RNs and Systems was subject to the state's regulatory power, while "[t]he touchstone of the pre-emption doctrine is conflict, actual or potential, between two systems which regulate labor activity." C. J. Morris, *The Developing Labor Law* (2d ed. 1983) at 1509. A pre-emption issue does not exist, if, as here, the state and federal systems regulate separate and mutually exclusive parties.

Petitioners cite a number of cases relating to the NLRB's assertion of jurisdiction over private employers with ties to governmental entities. Yet, none even remotely pertain to companies performing non-delegable duties which constitutionally and statutorily are vested exclusively in the states. For instance: *Koba Associates, Inc.*, 289 NLRB No. 33 (1988) (company provided personnel to maintain the Drug Enforcement Agency's drug information system); *Old Dominion Security, Inc.*, 289 NLRB No. 18 (1988) (company provided security services to the U.S. Navy); *Dynaelectron Corp., Aerospace Operations Division*, 286 NLRB No. 28 (1987) (contractor provided aircraft maintenance to the U.S. Navy); and, *Long Stretch Youth Home, Inc.*, 280 NLRB 678 (1986) (employer licensed by Maryland Social Services

Administration provided residential facility for teenage boys).

Even if the *Garmon* doctrine were arguably applicable, the obligation of the DOC to maintain control over the medical care provided at its facilities:

> touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.

359 U.S. at 244. This matter would clearly fall within the above-quoted exception to the pre-emption doctrine.

III. PETITIONERS' DILATORINESS WAIVED ANY PRE-EMPTION CLAIM

Petitioners' claim that the appellate court's March 30, 1990 decision raised a pre-emption claim for the first time is disingenuous. Respondent filed its unfair labor practice charge in June 1985. Petitioner, ISLRB, dismissed the charge without ever raising pre-emption as an issue. Respondent appealed to the appellate court, briefs were filed and oral arguments were made. The ISLRB never raised the pre-emption doctrine.

The court remanded the case for an evidentiary hearing. A two-day hearing was held in September 1987. The ISLRB, again, dismissed the charge on July 20, 1988, but the pre-emption doctrine was not the basis for the dismissal, nor was it raised. Respondent, again, appealed to the appellate court. The parties, including Systems as intervenor, filed briefs and made oral arguments. Federal pre-emption was not an issue.

After the second time the court ruled against the ISLRB and Systems, pre-emption was first raised in petitions to the Illinois Supreme Court in April 1990; five years, two administrative decisions and two appeals after the INA originally filed the charge. Had Petitioners genuinely believed pre-emption was an issue, they would

have raised it long before their petitions to the Illinois Supreme Court. Such dilatoriness does not evidence a good faith belief in their theory, but does evidence further attempts to delay a final resolution of this matter, as well as improper forum shopping. Petitioners' conduct should not be countenanced by the Court.

Petitioners' actions go far beyond the union's delay in *International Longshoremen's Assn. v. Davis*, 476 U.S. 380 (1986), and distinguish that case from this one. Chief Justice Rehnquist's caution in that case has been realized here "by allowing a defendant to save its pre-emption claim until after it sees the verdict this . . . poses a sufficient threat to orderly judicial proceedings." 476 U.S. at 399. Petitioners have not timely nor seriously raised a pre-emption issue.

CONCLUSION

Based on these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Chicago, IL 60601
(312) 977-1125
Attorney for Respondent
Illinois Nurses Association

October 3, 1990

* Counsel of Record

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APPENDIX

APPENDIX

STATE OF ILLINOIS
ILLINOIS STATE LABOR RELATIONS BOARD
320 West Washington Street, Suite 500
Springfield, Illinois 62701
(217) 785-3155

CHARGE AGAINST EMPLOYER

Do Not Write in This Space

Case Number

Date Filed

June 24, 1985

INSTRUCTIONS:

In accordance with the Illinois Public Labor Relations Act (*Ill. Rev. Stat.* ch. 48, § 1601 et seq.) and the Rules and Regulations of the Illinois Labor Relations Boards (80 *Ill. Adm. Code* § 1200.20 and § 1220.20), the following information is required. Submit an original and one (1) copy of this charge to the Illinois State Labor Relations Board. If more space is required for any item, attach additional sheet(s), numbering items accordingly.

1. Employer Against Whom Charge Is Brought

Name
State of Illinois; Department of Corrections
Telephone Number
(217) 522-2666

Address
1301 Concordia Court; Springfield, Illinois
Zip Code
62702

2. Employer Representative
Michael P. Lane, Director
Telephone Number
(217) 522-2666

Address
1301 Concordia Court; Springfield, Illinois
Zip Code
62702

3. It is alleged that the above-named employer has engaged in (an) unfair labor practice(s) within the meaning of Section 10(a), subsection(s) (1) (2) & (4) of the Illinois Public Labor Relations Act.

4. Basis of Charge (Specify facts, names, addresses, sites, dates, etc.) Use reverse side if necessary.

The Department of Corrections refused to bargain with the Illinois Nurses Association, the exclusive representative of nurses I, II, III & IV, nursing education assistant coordinators, and restorative program consultants regarding wages, hours and other conditions of employment for certain State of Illinois bargaining unit employees employed at Shawnee Correctional Center which the State of Illinois, Department of Corrections claims to be working for a sub-contractor but which is really a joint-employer with the State of Illinois. The Department of Corrections also refuses to apply the terms and conditions of the collective bargaining agreement between the State of Illinois and the Illinois Nurses Association to these bargaining unit employees. The violations occurred on or about March 1, 1985.

5. Relief or Remedy Sought by Charging Party

Make a determination that the Department of Corrections has committed an unfair labor practice and order it to cease and desist. Further, issue an order requiring the Department to apply the terms and con-

ditions of the RC-23 Illinois Nurses Association/State of Illinois contract to the bargaining unit employees employed at the Shawnee Correctional Center, now and retroactive to their date of hire.

6. Charging Party Name

Illinois Nurses Association
Telephone Number
(312) 236-9708
Address
Suite 2520, 20 North Wacker Drive; Chicago, Illinois
Zip Code
60606

7. Charging Party Representative

Sally A. Stix
Telephone Number
(312) 977-1125
Address
188 West Randolph, Suite 727; Chicago, Illinois
Zip Code
60601

I have read the above charge and all attachments. The statements contained therein are true to the best of my knowledge and belief.

By

Signature of Person or Representative

Address 188 West Randolph, Suite 727
Chicago, Illinois 60601

Title Attorney for Illinois Nurses Association

Telephone Number (312) 977-1125

Date June 24, 1985

ILLINOIS PUBLIC LABOR RELATIONS ACT (IPLRA)

Ill. Rev. Stat. ch. 48, ¶ 1603(n):

(n) "Public employee" or "employee, for the purposes of this Act, means any individual employed by a public employer, including interns and residents at public hospitals, but excluding all of the following: employees of the General Assembly of the State of Illinois: elected officials; executive heads of a department; members of boards or commissions; employees of any agency, board or commission created by this statute; employees appointed to State positions of a temporary or emergency nature; all employees of school districts and higher education institutions; managerial employees; short-term employees; confidential employees; independent contractors; and supervisors except as provided in this Act.

No. 90-404

FILED
MAR 6 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

ILLINOIS STATE LABOR RELATIONS BOARD, ET AL.,
PETITIONERS

v.

ILLINOIS NURSES ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST JUDICIAL DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the National Labor Relations Act preempts the Illinois State Labor Relations Board's jurisdiction over an unfair labor practice charge concerning the employees of a private company that performs contract services for the State of Illinois.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-404

ILLINOIS STATE LABOR RELATIONS BOARD, ET AL., PETITIONERS

v.

ILLINOIS NURSES ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST JUDICIAL DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. The Illinois Nurses Association (INA) is the exclusive bargaining representative for a state-wide unit of registered nurses employed by the State of Illinois. The bargaining unit includes nurses employed at state correctional centers. Pet. App. 5, 13-14; Pet. Supp. Br. App. 3. The bargaining unit is covered by a collective bargaining agreement between INA, on the one hand, and the Illinois Department of Central Management Services and Department of Corrections (DOC), on the other. The agree-

ment expressly grants the State the right to contract out nursing services. Pet. App. 23.

In late 1984, the State opened the Shawnee medium security correctional center (Shawnee). At about the same time, the State solicited bids seeking an outside contractor to provide health care services to Shawnee's inmates. In April 1985, the State awarded the contract to Correctional Medical Systems, Inc. (Systems), a for-profit corporation whose business is to deliver health care services in correctional facilities.[1] The initial contract ran through June 30, 1986. Pet. App. 5, 15, 31; Pet. Supp. Br. App. 3-4.

Under the contract, Systems hires and manages the entire medical staff at Shawnee. Systems also furnishes all hospitalization and outpatient services to the facility.[2] Until July 1986, the State compensated Systems for these services on a cost-plus-fixed-fee basis. Since then, Systems has been compensated on a per-inmate basis. Pet. App. 15, 31-32.

2. a. In June 1985, INA filed an unfair labor practice charge against the State with the Illinois State Labor Relations Board (ISLRB). INA alleged that the State had violated the Illinois Public Labor Relations Act, Ill. Ann. Stat. ch. 48, ¶¶ 1601-1627

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[1] As of March 1988, Systems had contracts with DOC to provide health care services at eight other correctional facilities in Illinois. Systems also had contracts with correctional facilities in sixteen other States. Pet. App. 31.

[2] At all relevant times, Systems' staff at Shawnee has included doctors, nurses, a dentist, a psychiatrist, a psychologist, a pharmacist, technicians, and clerical staff. Since July 1987, the Health Care Unit Administrator at Shawnee—the only health care employee who was ever an employee of DOC—has been a Systems employee. Pet. App. 5, 31-33; Pet. Supp. Br. App. 4.

(Smith-Hurd 1986), by refusing to apply its collective bargaining agreements with INA to the nurses at Shawnee. Pet. App. 65-66, 70.

The ISLRB dismissed the charge for lack of jurisdiction. It determined that the nurses at Shawnee were employees of a private employer (Systems) and that INA's complaint therefore fell outside the ISLRB's jurisdiction, which extends only to disputes between public employees and public employers. Pet. App. 65-66, 70-71; see Ill. Ann. Stat. ch. 48, ¶¶ 1601, 1603, 1605, 1611 (Smith-Hurd 1986). On June 5, 1987, the Illinois Appellate Court for the First Judicial District vacated the order of dismissal and remanded the case for evidentiary proceedings on the ISLRB's jurisdiction. Pet. App. 65, 68.

b. After hearing further evidence, the ISLRB again concluded that it lacked jurisdiction over the nurses at Shawnee. Pet. App. 4-5, 22-23.[3]

The ISLRB determined, first, that the nurses at Shawnee were employed by Systems, not the State. To make this determination, the ISLRB applied a "degree of control" test, explaining that such a test

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[3] The hearing officer's analysis of the case was different from the ISLRB's, but, like the ISLRB, she concluded that the ISLRB lacked jurisdiction over INA's unfair labor practice charge. Pet. App. 58. The hearing officer determined that the State retained sufficient control over the health care employees at Shawnee to make the State and Systems joint employers, but recommended dismissal because the ISLRB lacked jurisdiction over Systems. *Id.* at 52-54, 58. The ISLRB overruled the joint-employer determination. *Id.* at 21. It found that the State activities cited by the hearing officer—which involved "establishing certain minimum qualifications for the health care unit staff and * * * conducting contractual compliance checks"—did not "diminish [System's] ultimate control over labor relations." *Ibid.*

is used by the National Labor Relations Board to determine when the NLRB should assert jurisdiction over a private employer with ties to a governmental entity that is exempt from the National Labor Relations Act (NLRA). As the degree-of-control test was described by the ISLRB, the NLRB determines whether the private employer "has sufficient control over the employment conditions of the employees involved to enable it to bargain effectively with a labor organization, as required by the [NLRA]" (Pet. App. 18-19). The ISLRB concluded that in this case Systems, not the State, "control[led] every essential term and condition of the nurses' employment" (*id.* at 22). Specifically, Systems alone (1) solicited, interviewed, and hired applicants for employment, (2) disciplined, discharged, promoted, and transferred the employees, (3) determined employee work schedules and assignments, and (4) "retained complete authority over wages and other economic terms and conditions of employment." *Id.* at 19-21.

Based on these determinations, the ISLRB further concluded that it could not assert jurisdiction on the theory that Systems was an agent of the State. The ISLRB observed that its governing statute granted it jurisdiction "only [in] those situations where the 'agent' acts on behalf of the public entity in dealing with the 'principal's' *employees*." Pet. App. 22:

> Thus, in order for [Systems] to be the State's agent, it is essential that the nurses be employees of the State. Our examination of the record, however, has revealed that the nurses of Shawnee are employed by [Systems], and not the State.

Ibid.[4] For this reason, the ISLRB concluded, "We may not assert jurisdiction over [Systems] based upon an 'agency theory.' " Pet. App. 23.

c. On appeal by INA, the Illinois Appellate Court reversed and remanded the case to the ISLRB for proceedings on the substance of INA's complaint. Pet. App. 12. The appellate court concluded that, "despite [Systems'] control over the Shawnee nurses, [Systems] is in fact a true agent of DOC in the rendering of medical services at the Shawnee Correctional Center." *Id.* at 11. The court observed that, under state law and the state constitution, "a State has an affirmative duty to provide persons in custody with a medical care system that meets minimum standards of adequacy." *Id.* at 9. In the court's view, "any corporation performing duties which are statutorily (and constitutionally) mandated as government duties, must, at the very least, be acting on behalf of the State and is, thus, an agent of the State." *Id.* at 10. The court also found that, "[e]ven though DOC permitted Systems to control" the Shawnee nurses' employment, the contract and the law vested "the right to control" in DOC. *Id.* at 10-11.

d. The State and Systems petitioned the Illinois Supreme Court for appeal as of right or, in the alternative, for leave to appeal from the Illinois Ap-

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[4] The ISLRB's governing statute, Ill. Ann. Stat. ch. 48, ¶ 1603(o) (Smith-Hurd 1986), provides in relevant part:

> "Public employer" or "employer" means the State of Illinois, any political subdivision of the State, unit of local government or school district; authorities * * *; and any person acting within the scope of his or her authority, express or implied, on behalf of such entities in dealing with its employees * * *.

pellate Court's decision. In support of their petitions, they argued, *inter alia*, that the National Labor Relations Act preempted ISLRB jurisdiction over INA's unfair labor practice charge. Pet. App. 72-80. On June 1, 1990, the Illinois Supreme Court denied the petitions. *Id.* at 2. On July 19, 1990, the court denied motions for reconsideration but granted a motion for stay of its mandate pending the filing and disposition of a petition for certiorari. *Id.* at 1.

3. After the Illinois Supreme Court denied review, the ISLRB petitioned the NLRB for an advisory opinion on whether the NLRB would assert jurisdiction in this case. Pet. Supp. Br. App. 1; see 29 C.F.R. 102.98. On August 31, 1990, the NLRB issued an advisory opinion indicating that it would assert jurisdiction. Pet. Supp. Br. App. 13.

Adopting the state appellate court's findings of fact for purposes of the advisory ruling (Pet. Supp. Br. App. 8 n.11), the Board concluded that (1) Systems was an "employer" under Section 2(2) of the NLRA, 29 U.S.C. 152(2), and (2) Systems retained a "significant degree of control" (Pet. Supp. Br. App. 12) over the essential terms and conditions of employment of the health care employees at Shawnee, such that "it would * * * effectuate the purposes and policies of the [NLRA] to assert jurisdiction over [Systems]" (*ibid.*). In reaching the first conclusion, the Board determined that Systems was not exempt from the NLRA as a "political subdivision" of the State. *Id.* at 9 (citing *NLRB* v. *Natural Gas Utility Dist.*, 402 U.S. 600 (1971)); see 29 U.S.C. 152(2) (excepting "political subdivision[s]" from definition of "employer").[5] To reach

[5] In so concluding, the NLRB cited the state court's findings that Systems was a private corporation doing business in

the second conclusion, the NLRB applied the "degree of control" test, which guides the NLRB's discretionary determination whether to assert jurisdiction over a private employer with ties to an exempt governmental entity. Pet. Supp. Br. App. 10-12 (citing and discussing *Res-Care, Inc.*, 280 N.L.R.B. 670 (1986) and *Long Stretch Youth Home*, 280 N.L.R.B. 678 (1986)). In applying this test, the NLRB emphasized that Systems "retained extensive if not exclusive control over employee compensation" (Pet. Supp. Br. App. 11).[6]

DISCUSSION

The NLRB and the Illinois Appellate Court have reached directly conflicting determinations as to whether this labor dispute falls within federal or state jurisdiction. The Illinois Appellate Court held that INA's unfair labor practice charge is within the ISLRB's jurisdiction. The NLRB, on the other hand, has determined that INA's charge is within the exclusive jurisdiction of the NLRB.

The clash of jurisdictional determinations results from the decision by the State of Illinois to provide health care services at the State's correctional facilities through a private contractor. That decision illustrates an increasing trend among States to contract out services that in the past were performed by state

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several States—not just Illinois—and that Systems was an "independent contractor" rather than an administrative arm of the State. Pet. Supp. Br. App. 9.

[6] The NLRB found that any "operational control" retained by DOC "would not preclude meaningful bargaining" by Systems because "the control is exercised [by DOC] largely for security reasons," and "only [Systems] could actually terminate the nurses' employment." Pet. Supp. Br. App. 12.

employees.[7] Labor disputes involving the private employees who provide such services under contract are consequently arising with increasing frequency.[8]

With only narrow exceptions, labor disputes arising under the NLRA are to be resolved exclusively in accordance with the rights, duties, and procedures set forth in that Act. Thus, this Court has determined that the Act grants exclusive jurisdiction to the NLRB to adjudicate those disputes. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 242 (1959).

We believe that the question presented here—whether the NLRB has exclusive jurisdiction over a labor dispute involving employees of a private company that performs contract services for a State—warrants this Court's attention in light of the increasing frequency with which the question arises and the potential, illustrated here, for conflicting determinations of this question by state tribunals and the NLRB.

1. In our view, the Illinois Appellate Court erred when it held that the ISLRB has jurisdiction over INA's unfair labor practice charge.

In *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245 (1959), the Court held that

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[7] See National Inst. of Justice, *The Privatization of Corrections* 55-56 (1985); see also J. Donahue, *The Privatization Decision* 131-149 (1989).

[8] See Pet. App. 25 n.8, 54-56 (discussing varying approaches of state tribunals to question presented); see generally National Comm'n for Employment Policy, *The Impact of City and County Contracting Out on Government Workers* 11-13 (1988); R. Fitzgerald, *When Government Goes Private* 80-84, 115-116 (1988); Note, *Privatization of the Public Sector: A Look at Which Labor Laws Should Apply to Private Firms Contracted to Perform Public Services*, 3 Det. C. L. Rev. 805 (1986).

"[w]hen an activity is arguably subject to Section 7 or 8 of the [NLRA], the States * * * must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." The Court based this holding on Congress's intent in the NLRA to "entrust[] administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience." *Id.* at 242. Congress thus intended not only that labor disputes covered by the Act be resolved by federal law, but also that they be resolved exclusively by the NLRB. *International Longshoremen's Ass'n* v. *Davis*, 476 U.S. 380, 391 (1986). For this reason, when a dispute meets the *Garmon* preemption standard, it is immaterial "whether *state* law gives the state courts jurisdiction over" the controversy; the "jurisdiction provided by state law is itself pre-empted by *federal* law vesting exclusive jurisdiction over that controversy in another body." *Davis*, 476 U.S. at 387-388. In short, "[i]f there is pre-emption under *Garmon*, then state jurisdiction is extinguished." *Id.* at 391.

The Court addressed the showing required to trigger *Garmon* preemption in *International Longshoremen's Ass'n* v. *Davis, supra.* The proponent of preemption must "advance an interpretation of the [NLRA]" that makes the dispute at issue subject to the Act and that has not been "authoritatively rejected by the courts or the Board." 476 U.S. at 395. In addition, the proponent must "put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation." *Ibid.* This showing is required only "in the 'absence of a clear determination

by the Board'" that the dispute is subject to Sections 7 and 8 of the NLRA. 467 U.S. at 397 (quoting *Garmon*, 359 U.S. at 246).

In the present case, there *has* been a clear determination by the NLRB that the underlying dispute is subject to Sections 7 and 8.[9] In its advisory opinion, the NLRB decided that the rights and obligations of the Shawnee nurses and of Systems are governed by the NLRA. Pet. Supp. Br. App. 13. In doing so, the NLRB "actually determined the underlying issue upon which its jurisdiction depend[s]," *Marine Engineers Beneficial Ass'n* v. *Interlake Steamship Co.*, 370 U.S. 173, 184 (1962). Although that determination is not conclusive of the issue, it should be regarded as controlling under the *Davis* standard if it is adequately supported in the record and consistent with governing law. Here, we believe that standard was fully satisfied: The conduct underlying INA's unfair labor practice charge is "arguably subject to § 7 or § 8 of the [NLRA]." *Garmon*, 359 U.S. at 245.

INA's unfair labor practice charge alleged that INA was the exclusive bargaining representative for the nurses at Shawnee. Pet. App. 29-30. Based on this allegation, INA claimed that DOC violated its collective bargaining agreement by refusing to bargain with INA over the terms and conditions of the nurses' employment. *Id.* at 30. INA's claim is arguably governed by Section 8(a)(5) of the Act, because that provision makes it an unfair labor

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[9] We recognize that the NLRB's determination was made after consideration of the case by the courts below. But that determination, made on the basis of the state court's findings of fact, leaves no doubt that the preemption-triggering standard of *Davis* has been met.

practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. 158(a)(5). INA's claim also implicates Section 7 of the Act, 29 U.S.C. 157, which gives employees the right to bargain collectively through representatives of their own choosing.[10]

Whether INA's claim is in fact subject to Sections 7 and 8 turns on whether the claim involves an "employer" within the meaning of Section 2(2) of the Act, 29 U.S.C. 152(2). As explained above, the NLRB answered this question in the affirmative, and the NLRB's determination was fully warranted and sufficient to trigger *Garmon* preemption.

Section 2(2) defines "employer" to exclude "any State or political subdivision thereof." In *NLRB* v. *Natural Gas Utility Dist.*, 402 U.S. 600, 604-605

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[10] Amicus AFSCME asserts (AFSCME Amicus Br. 5 n.2) that INA's charge concerns "representation issues involving a given employer" that implicate Sections 2(2) and 9 of the NLRA. AFSCME appears to argue that, because this case may present issues under provisions of the NLRA other than Sections 7 and 8, the case does not raise a *Garmon* preemption issue. AFSCME's argument ignores Section 8(a)(5)'s reference to Section 9. See 29 U.S.C. 158(a)(5). Thus, unfair labor practice charges under Section 8(a)(5) often raise issues under Section 9 concerning the charging party's status as the duly authorized bargaining representative. See *La-Crosse Telephone Co.* v. *Wisconsin Bd.*, 336 U.S. 18 (1949) (NLRB has exclusive jurisdiction to determine representation questions involving employees covered by NLRA). More broadly, cases arguably subject to Sections 7 and 8 often present issues under other provisions of the NLRA. For example, the state action alleged to be preempted in *Davis* turned on the plaintiff's status as an employee or supervisor under Section 2(3) of the Act. 476 U.S. at 383-384. That a case requires interpretation of provisions of the NLRA in addition to Section 7 or 8 clearly does not render the *Garmon* doctrine inapplicable.

(1970), the Court noted with approval the Board's test limiting that exclusion to entities that are either "(1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate."

The NLRB here properly applied the *Natural Gas* criteria and correctly concluded that Systems was not exempt under Section 2(2). As the NLRB observed, and the state court had found, Systems is a private corporation doing business in numerous States. Pet. Supp. Br. App. 9. Moreover, Systems' contract with DOC expressly provides that Systems acts as an independent contractor in providing health care at Shawnee. *Ibid.* For these reasons, Systems clearly did not meet the *Natural Gas* criteria for exemption, and INA does not contend otherwise here.[11]

The NLRB was also correct in determining that Systems was not exempt under the discretionary doctrine enunciated by the Board in *Res-Care* and *Long Stretch Youth Home.* Under this doctrine, the NLRB may decline jurisdiction over a private employer with ties to an exempt governmental entity, depending on

> the extent of control retained by the employer over essential terms and conditions of employment and on the degree of control exercised by the exempt entity over the employer's labor relations policies; in short, whether the employer retained "sufficient control over the employment conditions of its employees to engage in mean-

[11] Instead, INA contends (Br. in Opp. 8-9) that the NLRB erred by failing to determine whether the Shawnee nurses were employed by Systems or by the State. This contention is incorrect. The NLRB made that determination by applying the degree-of-control test.

> ingful collective bargaining." *Res-Care*, 280 NLRB at 647; *Long Stretch Youth Home*, 280 NLRB at 681-682.

Pet. Supp. Br. App. 9-10. Based on the state court's findings, the NLRB concluded that the present case was "more like *Long Stretch Youth Home* than *Res-Care*" (*id.* at 11), and that it would "therefore effectuate the purposes and policies of the [NLRA] to assert jurisdiction" (*id.* at 12). Those conclusions fully accord with NLRB precedent. See *id.* at 12 n.15 (citing cases).

The contrary conclusion of the Illinois Appellate Court is improperly based on the application of state law.[12] The court determined that, since the State was required under state law to provide health care to prison inmates, Systems acted as an agent for the State and was therefore subject to the State's labor law.[13] But, as explained, under *Garmon* principles

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[12] See *Natural Gas*, 402 U.S. at 603-604:

> It is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law * * *. Nothing in the [NLRA's] background, history, terms or purposes indicates its scope is to be limited by * * * varying local conceptions, either statutory, or judicial, or that it is to be administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local problems * * *. Thus, it is clear that state law is not controlling * * *.

[13] Amicus AFSCME erroneously contends (AFSCME Amicus Br. 4) that no federal question is presented here because the Illinois Appellate court merely "invalidated the subcontract between DOC and Systems." The court did no such thing. In fact, the court partly relied on the DOC-Systems contract in concluding that Systems was an agent of the State. Pet. App. 10-11; see also *id.* at 23 (ISLRB emphasized that its function was not to determine validity of contract).

that law is preempted in this case. It is therefore irrelevant whether, in the absence of preemption, Systems would be subject to state law.[14]

INA contends (Br. in Opp. 7-9) that the appellate court's approach accords with the approach dictated by federal law. That contention is based on INA's erroneous assertion (*id.* at 8) that, under federal law, common law agency principles would determine whether Systems was DOC's agent and therefore exempt from the NLRA.[15] As explained, Systems' status as an "employer" under the NLRA is governed by the *Natural Gas* criteria, not by common law agency principles. In any event, the appellate court's conclusion in this case conflicted with the NLRB's, and the purpose of the *Garmon* preemption doctrine is to avoid "conflicting adjudications" as well as "differ-

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[14] The state court did not have the benefit of the NLRB's advisory opinion, but that does not justify the court's reliance on state law. The court should have examined federal law, including relevant NLRB decisions. If the court had any doubt, it could have sought an advisory opinion from the NLRB. See 29 C.F.R. 102.98(b). See also *Western Pa. School for the Deaf* v. *Commonwealth Labor Relations Board*, 438 A.2d 1025 (Pa. Commw. Ct. 1982) (court found that entity was not exempt from NLRA under the *Natural Gas* criteria, but sought advisory opinion as to whether NLRB would assert jurisdiction).

[15] INA's reliance (Br. in Opp. 7) on *NLRB* v. *United Insurance Co.*, 390 U.S. 254 (1968), is misplaced. *United Insurance* concerned the question whether insurance agents were exempt from the NLRA as "independent contractors." See 29 U.S.C. 152(3). The Court held that this question was governed by common law agency principles. *United Insurance*, 390 U.S. at 256. There is no issue here as to whether the Shawnee nurses are employees or independent contractors; they are concededly employees.

ent rules of substantive law." *Garmon*, 359 U.S. at 243.[16]

Nor does *West* v. *Atkins*, 487 U.S. 42 (1988), support INA's agency theory. See Br. in Opp. 5-6. In *West*, the Court held that a contracting physician was acting "under color of state law" when treating an inmate's injury and was therefore subject to suit under 42 U.S.C. 1983. That holding is inapposite here. As explained above, the Court in *Natural Gas* approved the criteria that the NLRB applied in this case to determine whether a private contractor is a state entity for labor law purposes.[17]

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[16] In *Garmon*, the Court suggested that preemption may not be appropriate when conduct arguably subject to Section 7 or 8 of the NLRA comprises activities that are "deeply rooted in local feeling and responsibility." 359 U.S. at 244. INA argues (Br. in Opp. 9-10) that this is such a case, because the duty to provide medical care to prison inmates is "nondelegable" and "vested exclusively in the states." INA misapprehends the exception to preemption recognized in *Garmon*. The exception focuses on the "conduct" sought to be "regulated." *Garmon*, 359 U.S. at 244; see also *id.* at 247 (regulation of violence and imminent threats to public order constitute the type of conduct that triggers the exception). Here, the conduct in question is the failure to apply the collective-bargaining agreement between the State and the INA to the nurses employed by Systems at Shawnee. This conduct implicates the issues whether the INA is the exclusive bargaining representative of the nurses at Shawnee and whether Systems is an employer subject to the NLRA—issues at the core of federal labor policy.

[17] In finding that Systems was not an agent of DOC for labor law purposes, the ISLRB emphasized "[t]his is not to say that other evidence might establish that [Systems] is the State's agent for other purposes *not* related to labor relations"—for example, "for purposes of civil liability exposure." Pet. App. 27 n.16.

2. INA contends (Br. in Opp. 10-11) that petitioners are precluded from raising their preemption claim because the claim "was first raised in petitions to the Illinois Supreme Court in April 1990." A similar contention was expressly rejected by this Court in *Davis*, 476 U.S. at 391, 393. There, the Court held that, because *Garmon* preemption is jurisdictional, "when a claim of *Garmon* pre-emption is raised, it must be considered and resolved by the state court." *Id.* at 393. Contrary to INA's contention (Br. in Opp. 11), the present case cannot be distinguished from *Davis* based on the stage at which the preemption claim was raised. Here, as in *Davis*, the claim was raised by the proponent of preemption after its state-law claim was rejected. Cf. 476 U.S. at 385, 399. In any event, the concurring opinion in *Davis* on which INA relies (Br. in Opp. 11) acknowledged that, under the Court's holding, NLRA preemption "may be raised at any time." 476 U.S. at 403. INA's contention that petitioners have "waived" the jurisdictional issue presented here is therefore without merit.

3. Likewise without merit is INA's contention (Br. in Opp. 4-5) that the judgment of the Illinois Appellate Court is "not a final judgment" within the meaning of 28 U.S.C. 1257.

INA's contention is defeated by *Construction Laborers* v. *Curry*, 371 U.S. 542 (1963). In *Curry*, the Court reviewed a state supreme court decision rejecting petitioner's claim that a state court action to enjoin labor union picketing was preempted under the *Garmon* doctrine. The Court held that the state court decision was a final judgment on the preemption issue, notwithstanding anticipated additional proceedings in state court on the merits of the state-law cause of action. *Id.* at 550. The Court emphasized

that allowing the matter to proceed to a state trial on the merits—a trial at which the union might win, thereby making it unnecessary to resolve the federal question—would seriously erode national labor policy providing for exclusive NLRB jurisdiction. *Ibid.*

The reasoning in *Curry* fully applies here. The Illinois state courts have rejected the claims of the State and of Systems that ISLRB jurisdiction was preempted under the *Garmon* doctrine. The federal issue has been "for all practical purposes concluded in the state tribunals." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 483 (1975) (discussing *Curry*). See also *Hudson Distributors* v. *Eli Lilly*, 377 U.S. 386, 389 n.4 (1964) (state supreme court's rejection of retailer's claim that state fair trade statute was preempted by federal antitrust laws was final and reviewable notwithstanding pendency of proceeding on the merits of petition for enforcement of state statute). The pendency of further state proceedings on state-law claims poses no bar to review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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ILLINOIS NURSES ASSOCIATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Illinois Appellate Court, First Judicial District

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RESPONDENT'S SUPPLEMENTAL BRIEF IN RESPONSE TO THE AMICUS BRIEF OF THE UNITED STATES

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RESPONDENT'S SUPPLEMENTAL BRIEF IN RESPONSE TO THE AMICUS BRIEF OF THE UNITED STATES

The Respondent, Illinois Nurses Association, respectfully submits this response to call to the attention of this Court the Solicitor General's failure to address a critical issue in this matter. A primary argument made by Respondent Illinois Nurses Association and Amicus AFSCME is that the Illinois Appellate Court was correct

in holding that Illinois law, pursuant to its constitution and statutes, as well as the federal constitution mandate the State of Illinois to be the employer in this case; and, therefore, a federal pre-emption question is not even presented. See Pet. Br. App. 3-12, Br. in Opp. 5-6 and AFSCME Amicus Br. 4. The United States only mentions this critical argument on page 13 and n.13 of its Amicus Brief. Nowhere does the United States address or rebut this argument.

CONCLUSION

For these reasons, and for all of the reasons previously set forth, the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 90-404

In The

Supreme Court of the United States

October Term, 1990

ILLINOIS STATE LABOR RELATIONS BOARD, ILLINOIS DEPARTMENT OF CENTRAL MANAGEMENT SERVICES, AND ILLINOIS DEPARTMENT OF CORRECTIONS,

Petitioners,

v.

ILLINOIS NURSES ASSOCIATION,

Respondent.

BRIEF OF AMICUS CURIAE AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, COUNCIL 31, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners' question is not presented under the terms and circumstances of the case. The question actually presented is the following:

> Does federal labor law preempt the power of a State to prohibit the contracting out of health services to inmates incarcerated in a state correctional facility and to render ultra vires and null and void any such contract?

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BRIEF OF AMICUS CURIAE AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, COUNCIL 31, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Amicus curiae opposes the petition for writ of certiorari.[1]

[1] Amicus curiae, pursuant to leave of the Illinois Supreme Court, participated as amicus curiae in the proceedings before that court.

STATEMENT OF THE CASE

Petitioners' Statement of the Case is essentially correct. The following facts are herein pertinent.

A collective bargaining agreement between Illinois Nurses Association ("INA") and the ILLINOIS DEPARTMENT OF CENTRAL MANAGEMENT SERVICES ("CMS") recognizes INA as the exclusive bargaining representative of professional registered nurses employed by the State of Illinois. (P. 4)

The ILLINOIS DEPARTMENT OF CORRECTIONS ("DOC") contracted with CORRECTIONAL MANAGEMENT SYSTEMS ("Systems") for the furnishing of health care services to the inmates in various state correctional facilities. (P. 5)

INA filed an unfair labor practice charge with the ILLINOIS STATE LABOR RELATIONS BOARD ("ISLRB") alleging that CMS and DOC had violated the Illinois Public Labor Relations Act ("IPLRA") by refusing to bargain with INA and by refusing to comply with the collective bargaining agreement applicable to professional nurses employed by the State of Illinois. (P. 5)

The ISLRB dismissed the charge, finding, on the basis of an evidentiary record and the application of NLRB law, that Systems, a private company subject to NLRB jurisdiction, was the employer of the nurses. (Pp. 6-7) In its opinion, the ISLRB described the impact of the relief sought by INA, e.g., application of the collective bargaining agreement to the nurses in question:

> ". . . . Should the state comply, the subcontractor relationship would cease to exist; indeed it is

> ludicrous to imagine that the contract could continue in effect with all State wages, benefits and other conditions of employment simply superimposed on it. The employees would in effect *become* those of the State." (App. 23)

On review, the Illinois Appellate Court reversed. Its decision was predicated on Illinois law which prohibited the contracting out of the State's nondelegable obligation to provide medical care to prisoners in state correctional facilities. (App. 10) Therefore, the Court ruled that, by operation of state law, DOC was the employer within the meaning of the IPLRA. (App. 11) The Court remanded to the ISLRB for a determination of the refusal to bargain charge against the State of Illinois. (App. 12)

The Illinois Supreme Court denied the petition to review that decision and later denied the petition to reconsider. (Apps. 1 and 2)

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. THE STATE COURT OF LAST RESORT HAS NOT DECIDED A FEDERAL QUESTION.

The remand order of the Illinois Appellate Court directed the ISLRB to litigate the refusal to bargain charge against the petitioners herein. Under Illinois law, a remand order is not a final or appealable order. See *Wilkey v. Illinois Racing Board*, 96 Ill.2d 245, 449 N.E.2d 843 (1983). Hence, the declination of the Illinois Supreme Court to accept this case for review, in the application of State law, was predicated upon lack of an appealable

order and not on the merits of the appellate court decision.

II. NO FEDERAL QUESTION IS PRESENTED.

As first above stated, Petitioners fail to even address the "question" which arises under the facts of this case. Instead, they argue issues not relevant to the case.

Applying Illinois law, the Illinois Appellate Court has invalidated the subcontract between DOC and Systems and directed the Petitioner ISLRB to recognize DOC as the employer of the nurses. It is that Court determination that is challenged in the petition. Yet, the petitioners never address the authority of the Illinois courts to make such a determination in the application of state law. Instead, the petitioners simply *assume* without either explanation or supporting rationale that Systems is the employer and proceed to base their entire argument upon the application of rather clear principles of federal law that would apply *if, but only if,* Systems *were* the employer.

Unless some principle of federal law preempts the right of a state to illegalize subcontracting of nondelegable state functions, there is no federal issue before this Court. No such federal principle is asserted.

No contention is made that the DOC is not an exempt state subdivision within the meaning of Section 2(2) of the LMRA. See *NLRB v. Natural Gas Utility District*, 402 U.S. 600 (1971). Hence, there can be no claim that the appellate court order, which deals only with the DOC as an employer, creates a conflict with the NLRB.

III. NO FEDERAL LAW CONFLICT IS CREATED WITH THE DECISION OF ANY OTHER COURT.

Petitioners do not suggest that any court has ever ruled that a state is preempted from illegalizing the subcontracting of nondelegable state responsibilities. Hence, Petitioners do not challenge the authority of the state to require that state agencies retain their responsibilities as the employer.

Petitioners argue only that a *Garmon* preemption issue is raised.[2] But since DOC and CMS are excluded employers under § 2(2) of the LMRA, there is no preemption issue.

IV. NO "IMPORTANT" FEDERAL ISSUE IS RAISED.

We can conceive of no argument that could be made that federal law preempts the sovereign power of a state to decide whether its nondelegable powers could be contracted out to private parties. Indeed, decisions of this Court dealing with questions of federalism render even the possibility of any such future decision most unlikely. See *Garcia v. San Antonio Metro. Transport Authority*, 469 U.S. 528 (1985); *Pennsylvania v. Union Gas Co.*, ___ U.S.

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[2] We believe that the petitioners erroneously characterize their pre-emption contention as a *Garmon* issue. *Garmon* dealt with conduct arguably subject to § 7 or § 8 of the LMRA and therefore within the exclusive jurisdiction of the NLRB. The instant pre-emption claim, properly characterized, relates to representation issues involving a given employer and employee unit with respect to which § 9 confers jurisdiction upon the NLRB. Not pre-empted is a case involving an employer excluded under § 2(2).

___, 57 USLW 4662 at 4663; *Texas, Inc. v. Short*, 454 U.S. 516 (1982); *Bishop v. Wood*, 426 U.S. 341, 345-346 (1976).

In the instant case, absent review by this Court, the ISLRB will implement the remand and require DOC and CMS to bargain with the INA and honor the provisions of the statewide contract covering registered nurses. The question of a federal issue will then end.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

CORNFIELD AND FELDMAN

BY /s/ Gilbert Feldman
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Attorney for amicus curiae